TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 123.

A. B. BALLARD AND JOSEPHINE W. BALLARD, PLAINTIFFS IN ERROR,

vs.

CHARLES W. HUNTER, A. HACKLER, AND THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED OCTOBER 3, 1905.

(19,917.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 19, 1906.

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a STATE OF ARKANSAS, *In the Supreme Court, set:*

Be it Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of November A. D. 1903 at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 2nd day of May 1904, a day of said term: and on subsequent days.

A. B. BALLARD ET AL., Appellant-,
v.
C. W. HUNTER, Appellee.

Appeal from Crittenden Ch'y Court.

b *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Arkansas, before you, or some of you, being the highest court of law or equity of said state in which a decision could be had in the said suit, between A. B. Ballard and Josephine W. Ballard, on one side, and Chas. W. Hunter, A. Hackler and the Board of Directors of the St. Francis Levee District, on the other, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or a treaty, or a statute of, or commissions held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error having happened, to the great damage of the said A. B. Ballard and Josephine W. Ballard, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in that behalf,

We command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ,
c so that you have the same at Washington on the second Monday of October, 1905, in the said Supreme Court, to be then

and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to corect that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice, of the Supreme Court, the 4th day of August, 1905.

[Seal of the United States Circuit Court, Eastern Division of the Eastern Judicial District, Arkansas.]

EMERSON R. CRUM,
Clerk of the Circuit Court of the United States for the Eastern Division of the Eastern District of Arkansas.

Allowed by
JOS. M. HILL,
Chief Justice of the Supreme Court of Arkansas.

Fee $1.00 paid Clerk by plaintiffs in error.
Filed Sept. 9th A. D. 1905.

P. D. ENGLISH, *Clk.*

STATE OF ARKANSAS, *ss:*

In pursuance of the command of the writ of error within, I, P. D. English, Clerk of the Supreme Court of the State of Arkansas, herewith transmit a true copy of the record and all the proceedings in this case of A. B. Ballard and Josephine W. Ballard *vs.* Chas. W. Hunter, A. Hackler, and the Board of Directors of the St. Francis Levee District, lately pending in the said Supreme Court, under my hand and the seal of the said Court.

Witness my official signature and the seal of the said Supreme Court at the City of Little Rock, in the State of Arkansas, this 9 day of Sept. 1905, and of the independence of the United States of America one hundred twenty-nine.

[Seal of the Supreme Court of Arkansas.]

P. D. ENGLISH,
Clerk of the Supreme Court of the State of Arkansas.

d THE UNITED STATES OF AMERICA:

To Chas. W. Hunter, A. Hackler, and the Board of Directors of the St. Francis Levee District, Greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States to be holden in the City of Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Arkansas, wherein A. B. Ballard and Josephine W. Ballard are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned,

should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand this the 18 day of Aug. 1905.

JOS. M. HILL,
Chief Justice of the Supreme Court of Arkansas.

For the Board of Directors of the St. Francis Levee District, a defendant in error in the above citation, service of the citation is hereby acknowledged, this 28th day of August, 1905.

H. F. ROLESON,
Attorney for Board of Directors of the St. Francis Levee Dist.

Filed Sept. 9th A. D. 1905.

P. D. ENGLISH, *Clk.*

Came to hand August 23, 1905, and executed by delivering a true copy to Mrs. A. Hackler, and also reading her the above notice, in Crittenden County, Ark., on the 26" day of August, 1905. Also executed by reading the above notice to Messrs. Berry & Shafer, as attorneys for the defendants in Crittenden County, Ark., on the 25th day of August, 1905, and delivering them a true copy thereof.

Chas. W. Hunter, and the Board of Directors of the St. Francis Levee District, are not to be found in my county.

This August 31", 1905.

C. L. LEWIS,
Sheriff Crittenden County, Ark.

Fees for service, $4.50 Paid by plaintiffs in error.

Filed Sept. 9th A. D. 1905.

P. D. ENGLISH, *Clk.*

STATE OF TENNESSEE, *County of Shelby:*

I, Wm. H. Harrington, a duly appointed and acting Deputy Sheriff, in and for the said County, do state on oath that on the 23rd day of August, 1905, at 3:05 o'clock P. M. I delivered to Chas. W. Hunter, named in the fore-going citation, a true copy thereof, at Memphis, Shelby County, Tennessee.

Fee $1.00 paid by pl'ffs in error.

W. H. HARRINGTON, *D. S.*

Subscribed and sworn to before me Jos. M. Connable a Notary Public in and for the said County, this 4th day of September, 1905.

Witness my hand and seal of office as such Notary public at Memphis, this 4th day of Sept., 1905.

[Seal Jos. M. Connable, Notary Public, Shelby County, Tennessee.]

JOS. M. CONNABLE,
Notary Public.

My commission expires on the 9th day of October, 1905.

e Know all men by these presents, that we, A. B. Ballard and Josephine W. Ballard, as principals, and Wm. M. Randolph, as sureties, are held and firmly bound unto the defendants, Chas. W. Hunter, A. Hackler, and the Board of Directors of the St. Francis Levee District, in the full and just sum of Five hundred dollars ($500.00), to be paid to the said Chas. W. Hunter, A. Hackler, and the Board of Directors of the St. Francis Levee District, their certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 18th day of August, 1905.

Whereas, lately in the Supreme Court of the State of Arkansas, in a suit pending in the said Court between A. B. Ballard and Josephine W. Ballard on one side, as plaintiffs, and Chas. W. Hunter, A. Hackler, and the Board of Directors of the St. Francis Levee District as defendants, on the other a judgment was rendered against the said A. B. Ballard and Josephine W. Ballard, and the said A. B. Ballard and Josephine W. Ballard have obtained a writ of error and filed a copy thereof in the office of the Clerk of the said Supreme Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Chas. W. Hunter, A. Hackler, and the Board of Directors of the St. Francis Levee District, citing and admonishing them to be and appear at a session of the United States Supreme Court to be holden at the City of Washington on the second Monday of October, next, has been issued.

Now, the condition of the above obligation is such, that if the said A. B. Ballard and Josephine W. Ballard shall prosecute the said writ of error to effect and answer all damages and costs, if they fail to make the said plea good, then the above obliga-
f tion will be void, else to remain in full force and virtue.

A. B. BALLARD,
JOSEPHINE W. BALLARD,
By RANDOLPH & RANDOLPH, *Att'ys.*
WM. M. RANDOLPH, *Surety.*

Sealed and delivered in the presence of

—— ——.

Approved by
JOS. M. HILL,
Chief Justice of the Supreme Court of the State of Arkansas.

Filed Sept. 9th A. D. 1905.

P. D. ENGLISH, *Clerk.*

g In the Supreme Court of the United States.

A. B. BALLARD and JOSEPHINE W. BALLARD, Plaintiffs in Error,
vs.
CHAS. W. HUNTER, A. HACKLER, and THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT, Defendants in Error.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The plaintiffs in error, named above, present herewith the writ of error sued out in the above styled case, lately pending in the Supreme Court of the State of Arkansas, and the return thereto, made by the Clerk of the Supreme Court of the State of Arkansas, including an authenticated transcript of the record of the above suit, from the said Supreme Court, and a citation to the defendants in error, named above, duly served on them, and pray that the judgment of the said Court, in the said suit, may be reversed, on the grounds set out in the following assignment of errors, to-wit:

(1.)

The lands belonging to the plaintiffs in error were not properly described in the complaint, or sued for the taxes they were sold for, in the suit, and in not so decreeing the said Supreme Court erred. Thereby the plaintiffs in error have been deprived of their *h* lands without due process of law, and in violation of the Constitution of the United States.

(2.)

The two tracts of land belonging to the plaintiffs in error, the Southwest quarter of Section 32 and the South half of the Northwest quarter of Section 32, were sold along with and as part of the West half of Section 32, when the plaintiffs in error did not own or claim the North half of the Northwest quarter of that section. For that reason the sale of the lands of the plaintiffs in error was unlawfully decreed and unlawfully made. In not so decreeing, the said Supreme Court erred. Thereby the plaintiffs in error have been deprived of their lands without due process of law, and in violation of the Constitution of the United States.

(3.)

The said lands of the plaintiffs in error were sold as a whole under the description of the West half of Section 32, and for the taxes on the whole West half, when the plaintiffs in error were not chargeable with the taxes on the North half of the Northwest quarter of Section 32. For that reason the decree of sale and the sale of the lands of the plaintiffs in error were void. In not so decreeing, the said Supreme Court erred. Thereby the plaintiffs in error have been de-

prived of their lands without due process of law, and in violation of the Constitution of the United States.

i

(4.)

The lands of the plaintiffs in error were sold for sums not legally chargeable thereon, to-wit: (*a.*) For fees to the Commissioner for furnishing printer with list of lands to be advertised; (*b.*) To the Commissioner for attending and making and reporting the sale; and (*c.*) To the printer for publishing a notice of the sale of each tract of land. For the said reasons the decree of sale, and the sales of the lands of the plaintiffs in error, were void. In not so decreeing, the said Supreme Court erred. Thereby the plaintiffs in error have been deprived of their lands without due process of law, and in violation of the Constitution of the United States.

(5.)

The Acts of the General Assembly, of the State of Arkansas, that is, Act No. 19 of the Acts of the year 1893, and No. 71 of the Acts of the year 1895, require a notice to be given to the owners of the lands proceeded against, in the suit they provide for, and no such notice was given plaintiffs in error, of the suit, and the decree of sale, and the sales in this suit, of their lands, for the want of such notice were unauthorized and void. And the said Supreme Court should so have decreed, and erred in not doing so. Thereby the plaintiffs in error have been deprived of their lands without due process of law, and in violation of the Constitution of the United States.

(6.)

j The notice provided for in Act No. 71 of the Acts of the General Assembly of the year 1895, assuming that notice was given in the suit, in accordance with that Act, was insufficient, and conveyed no adequate information of the suit to the plaintiffs in error. It was not such a notice of the pendency of the suit, as was required by the said Act of the General Assembly, or by the general law, to be given to the owners of lands who were citizens of the State of Arkansas, or residents of Crittenden County, Arkansas, where the lands involved here are located, or to persons owning and occupying lands located there, similarly circumstanced, and subject to the same taxation, or persons owning and having tenants on such lands. All such persons were entitled, by the said Act of the General Assembly, to and had personal notice of the suit for at least twenty days before the rendition of the decree of sale. The plaintiffs in error, as citizens respectively of the States of Georgia and Florida, and as non-residents of Crittenden County, and residents respectively of the States of Georgia and Florida, were allowed and were given notice constructively, if any was given, only by publication in a newspaper, published in Crittenden County, and only weekly, for four weeks, the date of the first publication of the notice being, and being required to be, only four weeks before the

rendition of the decree of sale. The plaintiffs in error had no personal or other notice of the said suit, and never appeared therein. The decree of sale has been rendered and the sale made without notice to them. The plaintiffs in error have thus been denied the privileges and immunities of citizens of the United States, and also denied the privileges and immunities of citizens of Arkansas, and have been denied the equal protection of the laws within the State of Arkansas, and have been deprived of their property without due process of law. By reason of such insufficiency and inadequacy of the said notice, the decree of sale and the sales thereunder of the lands of the plaintiffs in error to the defendants in error, *k* Hunter and Hackler, respectively, are void, and such sales pass no titles to them. The said Supreme Court should so have decreed, and in not so decreeing, erred. Thereby the plaintiffs in error have been deprived of their lands without due process of law, and in violation of the Constitution of the United States.

(7.)

Under the Constitution and the laws of the United States, and particularly the Fourteenth Amendment, the plaintiffs in error, were entitled to all the privileges and immunities of citizens in the several States, and their privileges and immunities as citizens of the United States could not be abridged by any law of the State of Arkansas, nor could they be deprived of their property without due process of law, nor denied the equal protection of the laws within the State of Arkansas. The plaintiffs in error under the general laws of the State of Arkansas were entitled to reasonable personal notice of this suit and of its purpose and object, or to such constructive notice thereof as was in substance the equivalent under the circumstances, of such reasonable personal notice thereof, before any step could be taken or any decree pronounced therein, binding them or their lands. The decree of sale has been rendered and the lands of the plaintiffs in error have been sold thereunder, and bought by the defendants in error, Hunter and Hackler, respectively, without any notice of the suit having been given the plaintiffs in error, as required by the general laws of the State of Arkansas. Thereby the plaintiffs in error have been denied the benefit of such laws, and have been deprived of their property in the lands in controversy by the proceedings and decree in this suit, and the sales thereunder, without *l* notice to them, and without due proces of law and in violation of the Constitution of the United States, and the said Supreme Court should so have decreed, and in not so decreeing, erred.

(8.)

The sales of the lands of the plaintiffs in error, as shown by the record of this suit, are void, and pass no title, because in such suits the laws of the State of Arkansas applicable, have been disregarded and violated, to-wit: (*a.*) There were no sufficient allegations of a cause of action in the complaint in this suit, as against the plaintiffs in error, or their lands; (*b.*) There was no sufficient affidavit made

and filed to support a warning order or order for notice to the plaintiffs in error; (*c.*) There was no sufficient proof of the publication of any warning order, or any notice to the plaintiffs in error, filed or produced in Court when the decree of sale of their lands was rendered; and (*d.*) The decree of sale does not state, and the record does not show, the facts essential to the validity of the decree of sale, as against the plaintiffs in error, or their lands. Thereby the plaintiffs in error, in violation of the Constitution of the United States, have been denied the benefit of such laws in this suit. The said Supreme Court should so have decreed, and in not doing so, erred. And the plaintiffs in error have been deprived of their property without due process of law.

(9.)

The decree of the 14th of February, 1898, under which the lands of the plaintiffs in error were sold to the defendants
m in error, as shown in the record, was rendered in violation of the laws of the State of Arkansas, requiring proof of evidence to support the allegations of the complaint, as against the plaintiffs in error and the lands, as persons before the Court only by the constructive service of process. Such decree was pronounced as based on an alleged order or decree *pro confesso,* entered in the suit, not authorized by law, and so was rendered without due process of law, and in violation of the Constitution of the United States. The said Supreme Court should so have decreed, and in not doing so erred. Thereby the plaintiffs in error have been deprived of their property without due proces of law.

August 25th 1905.

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,
Attorneys for Plaintiffs in Error.

Filed Sept. 9th 1905.

P. D. ENGLISH, *Clerk.*

n [Endorsed:] No. — A. B. Ballard, *et al. vs.* Chas. W. Hunter, *et al.* Assignment of Errors. Writ of Error to the Supreme Court of Arkansas. Filed Sept. 9th 1905 P. D. English Clerk Randolph & Randolph.

1 *Opening Order.*

STATE OF ARKANSAS, *County of Crittenden:*

Pleas before Hon. E. D. Robertson, Chancellor, presiding in the Chancery Court of Crittenden County, at the February term 1902, in the case wherein the Board of Directors of the St. Francis Levee District, is plaintiff, *vs.* The Memphis Land & Timber Co. and others defendants; and on the motion, answer, claim and petition of A. B. Ballard and Josephine P. Ballard, *vs.* Chas. W. Hunter and others,

in the said cause, when and where the following proceedings were had, to wit:

2 *Complaint.*

Complaint in Equity.

STATE OF ARKANSAS, *County of Crittenden:*

In the Chancery Court of Said County.

BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT, Plaintiff,

vs.

THE MEMPHIS LAND AND TIMBER COMPANY, JOHN ADAMS, B. L. Armstrong, Arkansas Land Company, S. A. Adams, John Armistead, S. Lundee, A. Alfrey, C. L. Allen, C. Barnette, Mrs. M. Buck, Alice Guerrant, Lem Banks, R. C. Brinkley, E. B. Currier, A. B. Ballard, Unknown Heirs of P. C. Bethel, Deceased; Mrs. A. B. Stull, Geo. W. Beeler, J. E. Botts, Unknown Heirs of P. G. Reeves, Unknown Heirs of W. D. Bethell, Deceased; W. N. Brown, A. V. Broadway, A. Boylen, R. W. Barton, G. H. White, A. H. Chatfield, Trustee; Mrs. J. A. Cartwright, S. Lentz, Albert Caldwell, Bolton Smith, Mary E. Conn, Unknown Heirs of Jno. R. Chase, Mrs. N. Calhoun, R. F. Crittenden, S. L. Cass, Minnie C. Robertson, J. T. Haden, S. J. Knott, M. A. Williams, Robert Clack, Aleck Cross, W. R. Cline, A. Cordes, Julia W. Collins, T. C. Crow, Henrietta D. Chambers, —— Kellar, Robert Cochran, S. R. Clark, C. B. Clark, Jr., W. C. Campbell, B. D. Cranch, S. Cunningham, N. B. Day, Owen Deveny, John Evans, John Ebert, L. Bicken, W. N. Brown, Jr., J. F. Rhodes, John Deihl, Ruth Earl, J. M. Williams, Trustee; W. H. Echols, Unknown Heirs of —— Edmonson, W. H. Elliott, Edwards Lumber Co., Margaret Fritz, L. S. Fritz, A. J. Foster, Louis Fritz, Unknown Heirs of H. Fitzgerald, Mrs. R. C. Fawcett, Sallie C. Browder, M. Gavin, J. M. Goodbar, Jessie Moon, Q. Gilman, Mrs. L. C. Thompson, T. M. Galbreath, P. Galbreath, Moses Hardin, Heirs — J. P. Hackler, N. Hill, N. Fontain, R. Hathaway, S. R. Hamblin, Unknown Heirs of J. C. Hall, J. H. Hardin, Wm. Hawley Ruby Maury, and O. M. Tufts, C. W. Hunter, A. B. Halbert, F. G. Harrison, Mrs. M. C. Hemingway, Allen Johnson, A. Boice, A. J. Johnson, John Johnson, A. H. Johnson, J. F. Jones, Alice Measles, C. A. Jenkins, Mina Jackson, E. T. Jackson, Heirs of Charlie Jones, Nina
3 Kelley, P. J. Kelley, Mrs. C. M. Keller, J. W. Kenton, James and Floy Keel, T. M. Klyce, Mary A. Lett, Mrs. Moses, C. L. Lewis, Ruth John, S. Long, W. B. Lockey, J. W. Loyd, J. N. Lee, E. Lowenstein, Little Rock & Memphis R. R. Co., Mrs. A. Morrison, Minor Meriwether, W. B. Morning, Mrs. S. A. Gilmore, D. E. Myers, W. M. Sneed, N. Hill, The Memphis Land & Timber Co., J. M. Meriwether, Mary Milburn, Mrs. L. B. Motley, Henry Morris, Woods Mahaffey, Frank Mahaffey, Walter

Mahaffey, Louis Meriwether, Julie Miller, L. D. Mullins, R. B. Safford, H. K. Morris, S. Morris, B. F. Moore, C. W. Martin, Thos. Malone, Unknown Heirs of Wm. Mitchell, Mrs. M. A. Morris, J. L. Sallie, and Elsie Malone. Mrs. M. Madden, G. E. McTigh, M. B. McKee, James McConnell, E. E. McGavock, G. I. Neptune, C. H. Orgain, A. Pierson, Jesse Peters, T. H. Persons, R. J. Person, Mrs. M. A. Quinn, Wm. Riley, James Riley, B. F. Rush, Unknown Heirs of J. R. Roman (?), M. P. Ramley, F. Reeves, Mrs. G. M. Connell, Rob't Rix, R. E. Richards, Hugh Shoemake, W. Stevenson, G. T. Stull, Dolph Smith, W. W. Swepston, Mrs. E. D. Davis, C. A. Smith, L. Swope, Sallie Taylor, Wm. Ticer, W. J. Taylor, Geo. Taylor, Ezekiel Thompson, R. G. Tucker, Agnes Toof, John Thompson, Unknown Owners, Unknown Heirs of G. H. Van Etten, J. P. Wheeler, T. H. Webb, Elizabeth Wilson, J. P. Walker, Mrs. F. H. Washburn, John Whitney, J. H. Williams, Wallace Williams, Geo. W. Wynne, Unknown Heirs of Joe Williams, F. P. Walker, Mrs. F. P. West, G. W. Waterford, M. B. Winchester, James Bassett, Annie Booker, Susan M. Chase, W. T. Crawford, R. F. Crittenden, Mrs. E. Davis, Pitsey Daniels, A. S. Grigsby, Jr., Wilson Harris, Allen Love, C. L. Lewis, A. W. Mathews, Joseph P. Marley, J. W. Reed, Mrs. Ada Williams, Wm. Wendell, R. Bankhead, A. T. Blankton, Jeff Black, P. Baksquard, H. N. Drinkwater, D. W. Dalton, C. F. Flanigan, A. Furbre, Wilson Groves, M. Henshaw, Mrs. Harris, C. T. Erby, F. W. King, Wm. Magher, A. V. Moore, Jas. McNamee, A. Vance, Hope Vance, C. Wessendorf, R. E. Winchester, W. H. Beattie, Jennie Davis, and George Morris, Defendants.

4 The plaintiff states that the following named defendants are non-residents of Crittenden County Arkansas, to wit: Arkansas Land Co., John Armistead, S. Lundee, A. Alfrey, Mrs. B. Buck, Alice Guarrant, Lem Banks, R. C. Brinkley, E. B. Currier, A. B. Ballard, Unknown heirs of P. C. Bethel, deceased, J. E. Botts, Unknown heirs of W. D. Bethel, dead, W. N. Brown, A. C. Broadway, G. H. White, A. H. Chatfield Trustee, Mrs. J. A. Cartwright, S. Lentz, Albert Caldwell, Bolton Smith, Unknown heirs of Jno. R. Chase, S. L. Cass, Minnie C. Robertson, Aleck Cross, A. Cordes, S. R. Clark, C. B. Clark, Jr., W. C. Campbell, B. D. Cranch, S. Cunningham, Owen Deveny, John Ebert, John Deihl, Ruth Earl, J. W. Williams Trustee, W. H. Echols, Unknown Heirs of —— Edmonson, W. H. Elliott, Edwards Lumber Co., Margaret Fritz, L. S. Fritz, Lewis Fritz, Unknown heirs of H. Fitzgerald, Mrs. R. C. Fawcett, M. Gavin, J. M. Goodbar, Jessie Moore, M. Galbreath, P. Galbreath, N. Hill, N. Fontaine, Unknown heirs of J. C. Hall, Ruby Maury and O. M. Tufts, C. W. Hunter, A. Halbert, Mrs. M. C. Hemingway, Allen Johnson, A. Brice, A. J. Johnson, John Johnson, Alice Measles, C. A. Jenkins, P. J. Kelley, Mrs. M. C. Keller, J. W. Kenton, James and Floy Keel, T. M. Klice, Mary A. Lett, Mrs. Moses, C. L. Lewis, Ruth Earl, W. B. Lockey, J. N. Lee, E. Lowenstein, Mrs. A. Morrison, Minor Meriwether, D. E. Myers, W. M. Sneed, N. Hill, The Memphis Land & Timber Co., J. Meriwether, Mary Milburn, Mrs. L. B. Motley, Woods Mahaffey, Walter Mahaffey, Frank

Mahaffey, Unknown heirs of Wm. Mitchell, Mrs. M. Madden, G. E. McTigh, M. B. McKee, E. E. McGavock, G. I. Neptune, C. H. Orgain, A. Pierson, Jesse Peters, T. H. Persons, R. J. Person, Mrs. M. A. Quinn, Wm. Riley, James Riley, Unknown heirs of J. W. Roman, M. P. Remley, Hugh Shoemake, W. Stevenson, C. A. Smith, R. G. Tucker, Agnes Toof, Unknown owners, Unknown heirs of G. H. Van Etten, Unknown heirs of Joe Williams, Mrs. Ada Williams, R. Bankhead, A. T. Blanton, Jas. McNamee, C. Wessendorf, W. H. Beattie.

5 The plaintiff, the St. Francis Levee District, states and represents to the Court that under and by virtue of the act of the General Assembly of the State of Arkansas, entitled "An act to lay off and establish "that part of the St. Francis basin lying within the States of Arkansas, into a levee district," and for protecting and maintaining the same and to incorporate a Board of Levee Directors "for said district, and for other purposes," which said act became a law without the approval of the Governor of said State of Arkansas on the 15th day of February, 1903, and the act amendatory thereof, which was approved on the 21st day of March, 1903, the following lands lying and being situated in said levee district, said county and State, and belonging to said defendants, named in the caption of this complaint, a list of which is hereto attached and asked to be taken as a part hereof:

List Land.

Township 3 North, Range 7 East.

Southeast quarter section 4, Township 3 North, Range 7 East, 160 Acres, Assessed to T. H. Allen, G. E. Seek and Louis Fritz—Taxes for year 1895, $6.40.

The East Half of South East Quarter Section 4, T. 3 R. 7 E. 80 Acres, assessed to Margaret Fritz—Taxes for 1897, $3.20.

The West half of Section 4, T. 3 N. R. 7 E. 160 Acres, assessed to J. Johnson—Taxes for 1897, $6.40.

The West half of Section 4, T. 3 N. R. 7 E. 320 Acres, assessed to J. Johnson—Taxes for 1897, $12.80.

The South East quarter of Section 3, T. 3 N. R. 7 E. 160 acres, assessed to David Fritz—Taxes for 1896, $6.40.

The East half, and the Northwest quarter of the northeast quarter of Section 3, T. N. R. 7 E. 120 Acres, assessed to Allen Johnson and A. Boyce—Taxes for 1896, $4.80.

The West half of the South West quarter of Section 3, T. 3 N. R. 7 E. 80 acres, assessed to J. Johnson—Taxes for 1897, $3.20.

6 Southeast quarter Section, 9, T. 3 N. R. 7 E. 160 acres, assessed to T. H. Allen, G. E. Seek and Louis Fritz—Taxes for 1897, $6.40.

South East quarter of North West quarter, Section 9, T. 3 N. R. 7 E. 40 acres, assessed to T. H. Allen, G. E. Seek and Louis Fritz—Taxes for 1897, $1.60.

All of section 9, T. 3 N. R. 7 E. 640 acres, assessed to J. Johnson—Taxes for 1897. $25.60.

Township 4 North, Range 7 East.

West half South East quarter Section 32, T. 4 N. R. 7 E. 480 acres, assessed to A. B. Ballard—
Taxes for 1895, $19.20
" " 1896, 19.20
" " 1897, 19.20

West half North East quarter, Section 32, T. 4 N. R. 7 E. 80 acres, assessed to A. B. Ballard—
Taxes for 1895, $3.20
" " 1896, 3.20
" " 1897, 3.20

North East quarter Section 31, T. 4. N. R. 7 E. 160 acres, assessed to A. B. Ballard—Taxes for 1895, $6.40.
" " 1896, 6.40.

were duly assessed for taxation for levee purposes in the name of the said defendants, whose names are written opposite to the said tracts of land respectively, as provided by said acts of the General Assembly hereinbefore referred to, and the taxes thereon being duly extended on the tax books of said Levee District, were duly returned by said collector and now remain on said tax books as delinquent, the taxes on said several tracts of land being as stated in the list herein before referred to as part hereof. That in accordance with the provisions of said acts, the Board of Levee Directors of said District called a meeting of the land owners in each of the respective counties within said Levee District in each county by posting notices
7 of the time and place of said several meetings in ten conspicuous places in each of said counties ten days before the day fixed for said meetings, at which meeting the proposition to levee an annual assessment for the year 1893 and subsequent years was submitted to said land owners, and at which meetings and on the day and at the places as fixed by said notices, a majority of all the land owners of said Levee District appeared in person or by their legal proxies, and at such meetings two thirds of all the land owners present as aforesaid voted in favor of the assessment as aforesaid, which proposed assessment for said year 1893 and subsequent years was two per cent. of the betterment or increased value, accruing to said lands for said years in said Levee District, by reason of said levee.

That in pursuance of the meeting aforesaid (said meetings conforming to and in all respects being held and conducted in accordance with the terms and requirements of said acts), the returns thereof were duly canvassed and the result declared as said statute directs. That proper notice of the result of such meetings was given in the manner and form as laid down by said acts, and the required proportion of the land owners of said district having met in pursuance of the notice required and given as aforesaid in conformity to said statutes, voted for said taxation, and the assessment and levy thereof were duly made by said Board of Directors.

That all the lands in said district were duly assessed for taxation, as per the said increased value, or betterment, thereof, by the assessors elected under said acts and in accordance with the terms and

requirements thereof; and the benefits, or increased value, as aforesaid of the lands herein described and referred to as belonging to the said defendants were assessed at the value of Two Dollars ($2.00) for each and every acre thereof for said year 1894 and the said lands were likewise assessed for, at the same rate for 1894, 1895, 1896 and
1897 said lands being and constituting a part of the area and
8 territory of said Levee District.

That in pursuance to the statute aforesaid, the said Board of Levee Directors elected one collector of taxes for each county in said Levee District, the person so elected for said county of Crittenden being the said Dr. R. W. Barton. That said Dr. R. W. Barton as collector aforesaid, on the first Monday in October 1894, 1895, 1896 and 1897 proceeded to collect said taxes due on the lands of said Crittenden County, and on the first Monday of October 1894, said Dr. R. W. Barton as collector proceeded to collect said taxes due on said lands for 1894, within said levee district, and that within the time limited by said statutes for the collection of said taxes no taxes were paid by said defendants nor by any one for them on their lands as aforesaid, and all of said taxes on said lands of said defendants, hereinbefore named in the caption to this complaint, are yet wholly unpaid and are delinquent, as shown by the certificate of the Secretary of said Board of Directors, which is subjoined to the list of said defendant lands, which list is hereto attached as a part of this complaint, marked "Delinquent lands of St. Francis Levee District of Crittenden County Arkansas," and as shown by said tax books themselves.

Plaintiff further states that by the terms and provisions of said acts of the General Assembly, plaintiff has a lien on said lands of said defendants for said unpaid taxes, together with interest thereon at the rate of six per cent. per annum from the first Monday in November, on 60¢ from first Monday in November 1894, 1895, 1896, and 1897 until paid, and the penalty of twenty five (25) per cent. as provided and imposed by said statutes for nonpayment of said taxes, which said taxes, without interest or penalty, amount to the aggregate sum of —— Dollars.

Wherefore, the premises considered, the plaintiff prays judgment to be given plaintiff against said defendants for said aggregate amount
of taxes, interest, penalty, and the costs of this proceeding,
9 and that such judgment be decreed to be a first lien on said
lands of said defendants above named and that for the pur pose of enforcing said decree, said lands to be condemmed and that they be sold by a commissioner of the court, to be appointed for the purpose under said acts of the General Assembly; and for all other relief that to the Court may appear just and equitable, as well as proper in the enforcement of said statutes.

That a warning order issue for the non-resident defendants herein named requiring them to answer the complaint of the plaintiff at the next January term of this Court, and that summons issue as to the other named defendants.

——— ———,
Solicitor for Plaintiff.

10 STATE OF ARKANSAS, *County of Crittenden:*

R. J. Williams states that he is the attorney for the plaintiff and that the chief officers of the St. Francis Levee District are absent from Crittenden County, and that the facts stated in the foregoing complaint are true.

(Signed) R. J. WILLIAMS,
Att'y for Pl'ff.

Subscribed and sworn to before me this the 21st. day of December, 1897.

(Signed) J. T. HADEN, *Clerk,*
Br R. F. WARD, *D. C.*

11 Endorsement & File Mark: #589. Board of Directors of the St. Francis Levee District *vs.* The Memphis Land & Timber Co. and others. Complaint. Filed this 21st. day of December, 1897. J. T. Haden, Clerk, By R. F. Ward, D. C. R. J. Williams, Sol. for Plaintiff. Answer of Memphis Land and Timber Company and others.

12 *Decree.*

FEBRUARY 14, 1898.

THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT, Pl'ff,
vs.
THE MEMPHIS LAND & TIMBER CO. ET AL., D'f'ts.

Decree.

Now on this day this cause coming on to be heard comes the Plaintiff, the Board of Directors of the St. Francis Levee District by R. J. Williams its attorney and the defendants B. L. Armstrong, C. Barnett, Mrs. A. B. Steel, Geo. W. Beel-r, A. Boylan, B. W. Barton, R. F. Crittenden, J. T. Haden, S. J. Knott, M. A. Williams, Robert Clack, W. B. Cline, Henrietta D. Chambers, Robert Cochran, L. Pickett, W. N. Brown, J. F. Rhodes, Sallie C. Browder, Q. Gilmore, Mrs. L. C. Thompson, J. P. Hackler, R. Hathaway, S. R. Hamlin, J. F. Hardin, W. B. Hawley, Ruby Tufts, Maney Tufts, O. W. Tufts, F. G. Harrison, James Keel, Floy Keel, J. T. Smith, C. L. Lewis, Ruth Earl, J. W. Floyd, W. B. Mooring, Mrs. S. A. Gilmore, E. Lewis Meriwether, H. K. Morris, S. Morris, Thomas Malon, Mrs. M. A. Morris, J. L. Malone, Jas. McConnell, B. F. Reese, G. McConnell, R. E. Richards, G. T. Stull, W. W. Swepston, Dolph Smith, Mrs. E. D. Davis, L. Swoope, William Ticer, Geo. Taylor, Ezekiel Thompson, T. H. Webb, Elizabeth Wilson, Mrs. F. H. Washburn, John Whitney, J. H. Williams, Geo. W. Wynne, G. W. Waterford, M. B. Winchester, Jas. Bassett, Susan M. Chase, Mrs. E. Davis, Wilson Harris, Allen Lane, William Wendell, P. Bansguard, H. N. Drinkwater, Mrs. Harris, Wil-

liam Margher, A. V. Moore, A. Vance, Hope Vance, R. E. Winchester, Jennie Davis, Mrs. Emma Mattox, who were duly served with summons in this cause as shown by the return of the sheriff filed herein came not but made default and the defendants the Me. his National Bank, C. W. Frazer Trustee, A. B. Hulbert, C. H. Orgain, Unknown heirs of Eli Rainer, Mrs. M. A. Madden, Wm. Randolf, C. B. Bryan, C. W. Hunter, G. E. McTighee, M. B. McKee, James Riley, Hugh Shoemake, Unknown heirs of G. C. Brown, M. Buck, Alice Guerrant, Ed. Bass, L. Luntz, John F. Rhodes, J. M. Capps, W. Z. White, G. H. White, J. A. Cartwright, S. Luntz, John Ebert, W. W. Swepston, G. A. Webber, A. Calhoun, John Armistead, S. Lundee, Mrs. L. S. Cass, M. C. Robinson, J. T. Haden, S. M. Buck, Unknown heirs of B. C. Crump, Unknown heirs of H. A. Dickens, C. A. Jenkins, J. S. & W. P. Lemaster, Minor Meriwether, R. G. Tucker, J. B. Cartwright, Unknown heirs of Wilhelminer Chaplin, Unknown heirs of Mrs. Chapman, Wm. Hawley, Ruby Merry, O. M. Tufts, Joseph & Floy Keel, J. F. Smith Guardian, Unknown heirs of J. D. Ware, M. A. Quinn, T. N. Cline, Mary A. Lett, Mrs. Moses, B. D. Couch, Owen Deveny, R. Hathway, Sallie & Elsie Malone, J. M. Goodbar, Mrs. A. Morrison, Bettie Shultz, A. E. Van Etten, John Adams, Lem Banks, W. N. Burns, J. M. Williams, Woods, Frank & Walter Mahaffey, W. B. Lockey, J. H. Van Etten, A. B. Webb, J. W. Stewart, Unknown heirs of Joe William, W. H. Elliot, G. H. Van Etten, M. A. Fisher, Mrs. R. C. Fawcett, Hewett & Montodonico, T. R. Huxtable, S. R. Clark, C. B. Clark, John McGrath, E. E. McGavock, Mrs. M. A. Quinn, Unknown heirs of Wm. Mitchell, A. Campbell, Margaret Fritz, David Fritz, Allen Johnston, A. Boyce, J. Johnson, D. E. Myer, Wm. Sneed, N. Hill, R. & S. Weiser, A. Pierson, Arkansas Land Co., R. B. Snowden, H. L. Brinkley, W. J. & R. C. Brinkley, E. B. Currier, Unknown heirs of Lucile Brinkley dec., A. B. Ballard, D. H. Rhodes, A. H. Johnson, Memphis Land & Timber Co. Jessie Peters, A. Bertionelli, J. E. Gunter, N. Stephenson,
13 T. H. Allen, G. E. Seek, Lewis Fritz, L. S. Fritz, Mary Milburn, M. P. Remley, W. Stephenson, J. M. Meriwether, Unknown heirs of P. G. Reeves, J. E. Botts, Rich. Earl, John Daihl, J. M. Williams, A. Cordes & Co., R. B. Earl, L. Picken, W. M. Brown, J. A. Rhodes, Gilmer Manchester, Jas. Meriwether, Mary F. Raines, R. J. Peerson, J. H. Meriwether, S. L. Conklin, M. Gavin, Wm. Riley, S. A. Adams, Unknown heirs of P. C. Bethell, Mrs. Jessie Moore, Unknown heirs of H. Fitzgerald, H. C. Moore, J. J. Jones, Alice Measler, Mrs. L. B. Motley, E. M. Avery, R. C. Shoemaker, Unknown heirs of W. Bethell, W. N. Brown, A. C. Broadway, T. C. Cran, H. D. Chambers, Sarah Floyd, J. W. Kenton, M. C. Keller, E. Lowenstein, J. N. Lee, Giles Meriwether, G. I. Neptune, T. H. Persons, W. C. Campbell, J. R. Greene, Unknown heirs of J. W. Roman, Albert Caldwell, Bolton Smith, W. H. Echols, Alexander Cross, C. A. Smith, Agnes Toof, F. G. Barton, A. Alfrey, W. D. Bethel, R. Galloway, Unknown heirs of C. C. Copenhaver, Edwards Lumber Co., N. Gould, C. W. Hunter, John Thompson, Mrs. S. Cunningham, Mrs. M. C. Hemingway, J. H.

McDavit, A. H. Chatfield Trustee and owners of lands who are unknown were severally constructively summoned by publication in a newspaper published in Crittenden County Arkansas weekly for four weeks before this day, proof of which has been previously filed herein and all of the above named defendants except A. H. Chatfield, The Memphis Land & Timber Co., and the Arkansas Land Co. having failed to plead answer or demur to the complaint of the plaintiff the Court on motion of the attorney for the plaintiff awards a decree *pro confesso* as to them in favor of the plaintiff for the amount of the taxes interest penalty and costs due for their said lands; thereupon this cause was submitted to the Court on the complaint of the plaintiff and the answer of the said A. H. Chatfield Trustee, The Memphis Land & Timber Co., and the Arkansas Land Co. and the documentary evidence the records of the Board of Directors of the St. Francis Levee District the records of the Board of Assessors of the said levee district the assessment books and the tax books for said levee district for Crittenden County the exhibits to the complaint and the oral evidence of Hugh R. McVeigh, secretary of the board of directors of said district, W. H. Newsome, Dr. R. W. Barton collector for Crittenden County and Arthur Vance assessor of said county for said levee district.

And upon consideration thereof the Court doth find that said board of directors of the St. Francis Levee District is a body politic duly organized under the laws of the State of Arkansas with power to sue and be sued, and it further appearing that the list of lands hereinafter described lie and are situated in said St. Francis Levee District in Crittenden County, Arkansas, and were duly assessed for taxation for levee purposes in the names of the said defendants whose names are written opposite each separate tract and that the taxes thereon were duly extended on the tax books of said levee district for said County and were duly returned by the collector of taxes for said levee district in said county and now remain on said tax books as delinquent, and the Court doth further find that in accordance with the provisions of an act of the General Assembly of the State of Arkansas entitled an act to lay off and establish that part of the St. Francis basin lying within the State of Arkansas into a levee district and for protecting and maintaining the same and to incorporate a board of levee directors for said district and for other purposes which became a law of the 15th. day of February 1893 and the act amendatory thereof which was approved on April 2, 1895, the Board of Levee Directors of said district called a meeting of the land owners in each of the respective counties within said levee district in each county by posting notices of the times
14 and places of said several meetings in ten conspicuous places in each of said counties ten days before the day fixed for said meetings, at which meetings the proposition to levy an annual assessment was submitted to said land owners and at which meeting and on the day and at the places as fixed by said notices a majority of all the land owners in said levee district appeared in person or by their legal proxies and at such meeting two thirds of all the land owners present voted in favor of the assessment as aforesaid, which

proposed assessment was two per cent. of the betterment or increased value accruing to said lands in said levee district by reason of said levee, that in pursuance of the meetings aforesaid said meetings conforming to and in all respects being held and conducted in accordance with the terms and requirements of said Act, the returns thereof were duly canvassed and the result declared as statute directs, the proper notice of the result of such meetings was given in the manner and form as laid down by said act and the required proportion of the land owners of said district having met in pursuance of the required *and* given as aforesaid in conformity to said statute, voted for said taxation and the assessment and levy thereof were duly made by the said Board of Directors, that all of the lands in said district in Crittenden County were duly assessed for taxation as per said increased value or betterment thereof by the assessor elected under said act for said county and in accordance with the terms and requirements thereof; and the benefit or increased value as aforesaid of the lands hereinafter described as belonging to said defendants whose names are written opposite each tract were assessed at the value of ($2.00) two dollars for each and every acre thereof for the years 1893, 1894, 1895, 1896, 1897, and the tax voted by the land owners of said district as aforesaid was likewise levied on said lands by the Board of Directors for the said years 1893, 1894, 1895, 1896, 1897; that in pursuance of the statutes aforesaid, the said Board of Directors of the St. Francis Levee District elected one collector of taxes for each county in said levee district the person so elected for Crittenden County for the years 1893, 1894, 1895, 1896 and 1897 being Dr. R. W. Barton, that the said Dr. R. W. Barton as collector as aforesaid on the first Monday in October of the said years 1893, 1894, 1895, 1896, and 1897 respectively proceed- to collect said taxes due on said lands in Crittenden County in said levee district for said years 1893, 1894, 1895, 1896 and 1897, and that within the time limited by said statutes for the collection of said taxes no taxes were paid by said defendants or any one for them on said lands and all of said taxes on said lands of said defendants are yet wholly unpaid and are delinquent; and the Court doth further find that the plaintiff has a lien on the said lands of said defendants for said unpaid taxes for the said years 1893, 1894, 1895, 1896 and 1897 together with interest thereon at the rate of six per cent. per annum from the first Monday of November of the years in and for which said — are delinquent respectively until paid and a penalty of twenty five per cent. of the said taxes for each year for which said lands are delinquent, as provided by said statute for the nonpayment of said taxes.

It is therefore considered ordered and adjudged and decreed by the court that the plaintiff the Board of Directors of the St. Francis Levee District do have and recover of and from the defendants severally to be enforced wholly against said lands, the amount of the taxes, interest penalty and costs assessed levied and extended against the lands belonging to each of said defendants respectively for the years 1893, 1894, 1895, 1896 and 1897 according to the following list and tabulated statement, to wit:

15 Township 3 North, Range 7 East.

South east quarter Section 4, Township 3 North Range 7 East, 160 acres, assessed to T. H. Allen, G. E. Seek and Louis Fritz—Taxes for year 1895, $6.40.

The East half of Southeast quarter Section 4, T. 3 N. R. 7 E. 80 acres, assessed to Margaret Fritz—Taxes for year 1897, $3.20.

The West half of East half of Section 4, T. 3 N. R. 7 E. 160 acres, assessed to J. Johnson—Taxes for 1897, $6.40.

The West half of Section 4, T. 3 N. R. 7 E. 320 acres, assessed to J. Johnson—Taxes for 1897, $12.80.

The Southeast quarter of Section 3, T. 3 N. R. 7 E. 160 acres assessed to David Fritz—Taxes for 1896, $6.40.

The East half, and the Northwest quarter of the Northeast quarter of Section 3, T. 3 N. R. 7 E. 120 acres, assessed to Allen Johnson and A. Boyce—Taxes for 1896, $4.80.

The West half of the Southwest quarter of Section 3 T. 3 N. R. 7 E. 80 acres, assessed to J. Johnson—Taxes for 1897, $3.20.

South East quarter section 9, T. 3 N. R. 7 E. 160 acres, assessed to T. H. Allen, G. E. Seek and Louis Fritz—Taxes for 1897, $6.40.

South East quarter of North West quarter, Section 9, T. 3. N. R. 7 E. 40 acres, assessed to T. H. Allen, G. E. Seek, and Louis Fritz—Taxes for 1897, $1.60.

All of Section 9, T. 3 N. R. 7 E. 640 acres, assessed to J. Johnson—taxes for 1897, $25.60.

Township 4 North, Range 7 East.

West half of South East quarter Section 32, T. 4 N. R. 7 E. 480 acres, assessed to A. B. Ballard—

Taxes for 1895, $19.20.
" " 1896, 19.20.
" " 1897, 19.20.

West half of North East quarter, Section 32, T. 4 N. R. 7 E. 80 acres assessed to A. B. Ballard—

Taxes for 1895, $3.20.
" " 1896, 3.20.
" " 1897, 3.20.

North East quarter section 31 T. 4 N. R. 7 E. 160 acres, assessed to A. B. Ballard—

Taxes for 1895, $6.40.
" " 1896, 6.40.

It is further adjudged and decreed that the total amount set opposite each several tract in the foregoing list of lands is the amount of the taxes, interest penalty and costs due thereon to the plaintiff and that the same be and is hereby decreed to be a lien on each of said tracts respectively and it is further ordered adjudged and decreed that any of said defendants or any person for him or them or any person claiming any of said lands or any interest

therein may before sale pay to the clerk of this court the amount of the taxes interest penalty and costs set opposite each several tract in the foregoing statement and the costs hereinafter provided for that may have accrued at the time of payment and said clerk shall give him a receipt therefor and note the fact of payment and by whom made on the margin of this decree and such payment shall be a discharge of this decree as against the tract so paid on and it is further ordered adjudged and decreed that the clerk of this court be and he is hereby appointed commissioner of this court and is hereby directed to sell the lands hereinbefore described on which the lien has not yet been discharged as above provided at the front door of the court house of Crittenden County at public outcry to the highest bidder for cash in hand, after first having advertised said lands for sale by publication of a notice of said sale weekly for two weeks consecutively in some newspaper published in said county if there be one, and if no such paper is published in said county then he shall advertise such sale as above set forth in some newspaper published in an adjoining county
16 and if all the lands be not sold on the day as advertised such sale shall continue from day to day till completed, and it is further ordered adjudged and decreed that said commissioner shall execute a deed of conveyance to the purchaser of the land so sold and may include all the lands so sold to one purchaser in one deed, for which he shall receive a fee of one dollar to be paid by the purchaser.

It is further ordered adjudged and decreed that if the sum of the tax due together with the interest penalty and costs on any tract of land herein ordered to be sold is not bid for the same the said commissioner shall bid the same off in the name of the Board of Directors of the St. Francis Levee District, bidding therefor the whole amount due as aforesaid and shall execute a deed of conveyance therefor to said Board of Directors of said St. Francis Levee District.

It is further ordered adjudged and decreed that there shall be allowed to said commissioner fees as follows, for furnishing printer with list of lands to be advertised five cents per tract and for attending and making and reporting sale twenty five (25) cents per tract, and there shall be allowed to the printer for publishing said notice fifty (50) cents per tract, which fee shall be taxed as costs against each several tract to be paid by the purchaser or person discharging said lien before sale and the said commissioner shall report his proceedings hereunder to the next term of this court.

To which judgment and decree of the Court the defendant A. H. Chatfield Trustee excepted at the time and prayed an appeal to the Supreme Court of the State and asked and was granted sixty days in which to present and file his bill of exceptions.

(Signed) E. D. ROBERTSON, *Chancellor.*

17 [Endorsed:] #589 Equity. Entered in Chancery Record "G" Page 463 Board of Directors of St. Francis Levee District *vs.* Memphis Land & Timber Co. Levee Taxes 1897.

18 *Order.*

Crittenden Chancery Court, Crittenden County, Ark., July Term, 1898.

Chancery Record "G," Page 510, July 19th, 1898.

#589.

THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND AND TIMBER CO.

Renewal Order of Sale.

On this day comes the plaintiff by R. J. Williams its attorney and the defendant by L. C. Going its attorney and this cause coming on to be heard the defendant by its said attorney asked leave to withdraw the petition for a restraining order issued herein in vacation, which was granted by the Court, thereupon the plaintiff by its said attorney moved the court to vacate and annul the restraining order made in vacation on the petition of the said defendant and to renew the order of sale made at the last term of this court and on consideration thereof the court doth order and adjudge that the restraining order issued herein be vacated annul-ed and set aside, and the court doth further order that the commissioner of this court, appointed at the last term, to execute the decree entered in this cause be and he is hereby directed to advertise and sell the lands claimed by the defendants to satisfy the amount adjudged to be due plaintiff if the same with interest thereon be not paid by the said defendants within sixty days from this date, according to the terms and in the manner prescribed by said decree and that he report his proceedings herein to the next term of this court.

19 *Report Filed.*

Crittenden County Chancery Court Record "G."

July Term, 1898, Page 519.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
MEMPHIS LAND AND TIMBER CO.

On this day the commissioner in this cause files his report of sale.

Crittenden County Chancery Record "G."

July Term, 1898, Page 529.

THE BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND AND TIMBER CO. ET ALS.

Decree of Confirmation.

Now on this day the report of the commissioner heretofore filed in this cause, coming up for confirmation and no exceptions having been filed herein, which report is in words and figures as follows to wit:

#589.

Commissioner's Report of Sale.

In the Crittenden Chancery Court, July Term, 1898.

"THE BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND & TIMBER CO. ET ALS.

To the Hon. E. D. Robertson, Chancellor:

The undersigned as the Commissioner appointed by the Court to execute the decree rendered on the 14th. day of February 1898 at the January Term 1898 of said Chancery Court in the above entitled cause, respectfully reports that after giving notice for two consecutive weeks, prior to day of sale by publication in the Marion Reform, a newspaper in said county for the time and in
20 the manner prescribed by law and the said decree, he did on the 13th. and 14th. days of June 1898 at the Court House doors in Crittenden County, Arkansas, within legal hours, offer the lands described in the statement below for sale to the highest bidder for cash in hand; and at said sale said lands were struck off and sold to the persons whose names appear opposite each tract for the prices and sums therein set forth, they being the highest bidder therefor.

Township 3 North, Range 7 East.

Johnson & Boyce, East ½ and North West of North East ¼ section 3, 120 acres, valued at $240.00 for the taxes of 1896, $4.80 Interest $0.35 Penalty $1.20 cost .95 total $7.30 sold to C. W. Hunter for $8.10.

John Johnson, owner, West ½ South west ¼ Section 3, 80 acres valued at $160.00 for the taxes of 1897 $3.20, Interest .05, penalty .80 cost 95 cents total taxes due $5.00 sold to C. W. Hunter for $5.80.

John Johnson owner, West ½ South east ¼ section 4, 80 acres valued at $160.00 for the taxes of 1897, taxes $12.80 interest 20 cents, penalty $3.20 cost 95 cents total taxes $17.15, sold to C. W. Hunter for $5.80.

John Johnson owner, west half of Section 4, 320 Acres valued at $640.00 for the taxes of the year — total taxes $17.15 sold to C. W. Hunter for $200.50.

John Johnson owner, all section 9, 640 acres valued at $1280.00, taxes for the year 1897, interest 40 cents, penalty $6.40 cost 95 cents total taxes, $33.35 sold to L. P. Berry for $360.00.

A. B. Ballard owner, North East ¼ section 31 T. 4 N. R. 7 E. 160 acres valued at $320.00 for the taxes for the years 1896 and 1897, taxes $12.80 Interest 58 cents, penalty $3.20, costs 95 cents total taxes, $17.53 sold to A. Hackler for $18.50.

21 Township 4 North, Range 7 East.

A. B. Ballard owner, West half and south east quarter section 32, 480 acres valued at $690.00 for the taxes for the years 1894, 1895, 1896 and 1897, interest $4.30 penalty $14.40 costs 95 cents total taxes, $77.27 sold to C. W. Hunter for $78.25.

A. B. Ballard owner west half of North east quarter of section 32 80 acres valued at $160.00 taxes for the years 1894–1895–1896–1897 interest 72 cents, penalty $2.40 costs 95 cents, total taxes $13.67 sold to C. W. Hunter for $14.50.

Recapitulation

J. T. HADEN,
Commissioner.

Marion, Arkansas, July 20th, 1898.

Endorsed: Filed July 20th, 1898, J. T. Haden, Clerk.

"and it appearing to the court that the property was duly and legally advertised for sale as provided by law and the decree of the court and that said sale was made at the time and place and in the manner prescribed by the order of the Court, and that said sale was in all things regular and fair that the said property was sold for a sum larger than the amount adjudged to be due the plaintiff and which was adjudged to be a lien on said lands and that there is now in the hands of the Commissioner the sum of —— belonging to the plaintiff and that there is money in the hands of the Commissioner belonging to the owners of said lands prior to and at the time of the sale bid for said land and paid by the purchasers in excess of the sum adjudged to be due thereon.

It is therefore considered ordered, adjudged and decreed that the said sale be and the same is in all things approved and confirmed except to the lands claimed by the following persons to wit, * * * and that as to the lands last above described the parties praying to be allowed to redeem the same, the prayer of the petitioners is hereby granted; it is therefore considered ordered, and ad-
22 judged by the court, that the said sale as to the said lands last above described be set aside and annulled and except the

East half North west quarter section 9, and the west half North west quarter section 9, all in township 8 North Range 6 East, petitioners to redeem which is now pending before the court.

It is further ordered that the Commissioner pay over to the Treasurer of the St. Francis Levee District the amount reported to be in the hands of the said commissioner within ten days from this date, and it is further ordered that the said commissioner pay over to the owners of said lands at the date of said sale the amount of money bid and paid for said lands by the purchasers thereof, in excess of the amount adjudged to be due from said lands.

It is further ordered that the Commissioner pay over to the purchasers of the lands, which by the order of the Court have been redeemed from the sale, the amount paid to the Commissioner by such purchasers with interest paid, and it is further ordered that a writ of possession be issued by the Clerk at the request of any of the purchasers of the lands reported as sold in this cause.

Crittenden County Chancery Court Record "G."

January Term, 1899, Page 567.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
MEMPHIS LAND & TIMBER CO. ET ALS.

Report of Sale Filed.

On this day the comissioner in this cause files his amended report herein.

23 *Report of Commissioner.*

Crittenden County Chancery Court Record "G."

January Term, 1899, Page 570.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
MEMPHIS LAND AND TIMBER CO. ET ALS.

Supplemental Report of Commissioner.

On this day the Commissioner files his supplemental report herein.

Petition John Johnson Filed.

Crittenden County Chancery Court Record "G."

January Term, 1899, Page 570.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
MEMPHIS LAND AND TIMBER CO. ET ALS.

On this day the petition of John Johnson is filed in this cause.

24

Petition John Johnson Denied.

Crittenden County Chancery Court Record "G."

January Term, 1899, Page 575.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
MEMPHIS LAND AND TIMBER CO. ET ALS.

John Johnson this day comes into court and files his petition to be allowed to pay the judgments herein embracing the taxes penalties and costs and the costs of this suit with reference to the W. ½ of the S. W. ¼ of section 3; West half of the South east ¼ of section four (4) the west half of section four (4) and section nine (9) all in township 3 North Range 7 East and to redeem the said lands from the sale herein made, and to discharge them from further proceedings in this suit; and tenders the amount of money necessary for the said purpose or else to be paid the surplus in Court of the purchase money after paying the taxes penalties and costs.

It is therefore ordered that the said petition of the said John Johnson to set aside the Confirmation of the said sale be denied and that the confirmation stand as made.

It is further ordered that the Clerk and Commissioner pay to the said John Johnson or his solicitor- of record Randolph & Randolph, the sum of money remaining in his hands as the proceeds of the sales of the said tracts of land respectively, after paying the taxes, penalties and costs and costs herein, and the proportion of the costs of this suit chargeable to said tracts of land respectively and take the proper receipt therefor.

25 *Deed to Hackler.*

Crittenden County Chancery — Record "G."

January Term, 1899, Page 585.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND & TIMBER CO. ET ALS.

Deed to A. Hackler.

On this day J. T. Haden the Commissioner appointed to execute the decree rendered in this cause, produces to the Court here his deed to A. Hackler, the purchaser of the lands and premises mentioned and described in said decree and upon examination of said deed the same is in all things approved.

And thereupon the said J. T. Haden, here in open court acknowledged that he had executed said deed to A. Hackler for the lands and premises therein described to wit:

N. E. ¼ Section 31 T. 4 N. R. 7 E. 160 acres, for the consideration and purposes therein mentioned and set forth; and it is ordered by the court that a copy of this order and acknowledgment be entered upon said deed and certificate by the Clerk under the seal of this court, to the end that the same may be entitled to record.

26 *Deed to Hunter Approved.*

Crittenden County Chancery Court Record "G."

January Term, 1899, Page 585.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND AND TIMBER CO. ET ALS.

Deed to C. W. Hunter.

On this day J. T. Haden, the Commissioner appointed to execute the decree rendered in this cause, produces to the Court here, his deed to C. W. Hunter the purchaser of part of the lands and premises mentioned and described in said decree, and upon examination of the deed the same is in all things approved. And thereupon the said J. T. Haden here in open court acknowledges that he has executed said deed to C. W. Hunter for the lands and premises therein described to wit:

E. ½ and N. W. ¼, section	3	T. 3. N. R. 7 E.	120 acres
W. ½ S. W. ¼ "	3	T. 3. N. R. 7 E.	80 acres
W. ½ "	4	T. 3. N. R. 7 E.	320 acres
W. ½ S. E. ¼ "	4	T. 3. N. R. 7 E.	80 acres
All "	9	T. 3. N. R. 7 E.	640 acres
W. ½ and S. E. ¼ "	32	T. 4. N. R. 7 E.	480 acres
W. ½ N. E. ¼ "	32	T. 4. N. R. 7 E.	80 acres

for the considerations and purposes therein mentioned and set forth; and it is ordered by the Court that a copy of this order and acknowledgment be entered upon said deed and certified by the Clerk under the seal of this court, to the end that the same may be entitled to record.

27 *Leave to File Bill of Review.*

Crittenden County Chancery Court, Record "H."

September Term, 1899, Page 5.

THE BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
MEMPHIS LAND AND TIMBER CO. ET ALS.

A. B. Ballard and Mrs. Josephine W. Ballard come by their solicitors and on their motion leave is given them to file herein their answer, motion, petition and Bill of Review herein, and be made parties to this suit with reference to the N. E. ¼ of Section 31, The Southwest ¼ of section 32, and the south ½ of the North west ¼ of section 32, all in township 4 North Range 7 East, and the said pleading is ordered to be filed and they are made defendants and parties to this suit for the purposes set out in said pleadings.

And thereupon the said C. W. Hunter by L. P. Berry Esq. his attorney enters his appearance herein and has ninety days given him within which to plead answer or demur herein.

28 *Leave to File Answer.*

Crittenden County Chancery —, Record "H."

September Term, 1899, Page 6.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND & TIMBER CO. ET ALS.

Richard H. Allen, Harry Allen, Mary L. Latham, and John C. Latham her husband, Ellen Allen, Thos. H. Allen Jr. a minor by —— his next friend and guardian *as litum*, Floy G. Allen, John C. Latham in his own right, Jno. B. Leech, Samuel B. Leech, all Executors of Jno. B. Leech, deceased, Jno. Fritz, The Phœnix Fire and

Marine Insurance Co., the Memphis Savings Bank, the City National Bank, located at Cairo Ill. and C. W. Edmonds as assignee of the Hill Shoe Co. all come by their respective solicitors and on their motion leave is given them to file herein their answer, motion, petition and Bill of Review herein and to be made parties to this suit with reference to the west half of the South west ¼ of section 3, West half of the South east ¼ of section 4, and the west ½ of section 4, all section 9, the North west ¼ of section 10, the west half of section 4, west half of the north east ¼ of section 4, and west half of the south west ¼ of section 3, all in township 3, North Range 7 East, and the said pleadings is ordered to be filed and all the said parties are made defendants and parties to this suit for the purposes set out in the said pleading.

And thereupon the said C. W. Hunter by L. P. Berry Esq. entered his appearance herein and has ninety days given to plead, answer or demur herein.

29 *Answer to Motion of Ballard.*

In the Chancery Court of Crittenden County, Arkansas.

Eq. D., No. 539.

THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND AND TIMBER COMPANY, and Others.

To the Hon. E. D. Robertson, Chancellor:

The answer and motion of A. B. Ballard, who is a citizen of the State of Forlida, residing at Tampa, and Mrs. Josephine W. Ballard, who is a citizen of the State of Georgia, residing at Atlanta, also to be taken and considered as a petition, under Sec-. 5839 5843, Sandels & Hill's Digest, and as an original Complaint, under Sec-. 4197-4199 of same and under Sec-. 6120-6124 of same, and the amendments thereto, and as a Bill of Review under the Chancery practice, as appears by the prayer herein.

(1.)

The above named parties state and show that A. B. Ballard, now deceased, the father of the defendant A. B. Ballard, and the former husband of the defendant Mrs. Josephine W. Ballard, departed life many years since, being then the owner of the following described and other lands, situated in Crittenden County, Arkansas, to wit: The North East quarter of Section 31; the Southwest quarter of Section 32: and the South half of the North west quarter of section 32, all in township 4 North, Range 7 East. The said land upon the death of A. B. Ballard, who died intestate, descended to the defendant A. B. Ballard, as his sole heir at law, the defendant Mrs. Josephine W. Ballard, as widow, having the right of dower therein, under the statute in the behalf.

The said above described lands and other lands were granted and patented to the State of Arkansas, under and by the act of Congress

approved September 4th. 1841, as Internal Improvement
30 Land. It was sold by the State of Arkansas as follows: the north east quarter of section 31, t- F. W. Royster, on the 19th. day of January, 1848, who transferred his rights to said A. B. Ballard. And on the 25th. day of August 1857, the State of Arkansas made A. B. Ballard a Grant and Patent for the said tract of land, thereby vesting the title in him.

The South west quarter of section 32 and the south half of the North west quarter of section 32, were sold by the State of Arkansas to E. F. Watkins, on January 19th. 1848, who transferred his right to the said A. B. Ballard. And on the 7th. day of October 1857, the State of Arkansas Granted and Patented to the said A. B. Ballard the said tracts of land, and vested the title in him.

The above facts appear in the records of the office of the Commissioner of State Lands, and if required, these defendants will produce certified copies of the patents. They deem the same unnecessary, however, for the purposes of this suit.

(2.)

In the suit in the Circuit Court of Crittenden County, wherein the State of Arkansas on relation of Crittenden County, was plaintiff, and John Crawford, Auditor, and others, were defendants, the said described lands, and other lands, were condemned to be sold for the non-payment of taxes then found by the decree in the said suit to be due to the State, and the County of Crittenden.

Thos. B. Turley, a citizen of the State of Tennessee, became a purchaser of the said tracts of land, above described, in the said suit, at a sale made by the Commissioner appointed by the decree therein, and transferred his purchase of the same to the Memphis Land and Timber Company, a corporation of the State of Tennessee, located at Memphis, and A. H. Ferguson, the Commissioner appointed by the Circuit Court in the said suit, and who made the sale, conveyed by a deed to be found of record in the office of the Recorder of Crittenden County, Book A. Vol. 2, p. 545 and following and confirmed by the Court in the said suit, the said tracts of land to the Memphis Land & Timber Co.

31 Reference is here made to the record of said deed, and a copy will be produced as a part of this answer, on the hearing, if required.

The said Memphis Land and Timber Co. afterwards, by a deed to be found of record in the office of the Recorder of Crittenden County, in Book C. Vol. 2 p. 106, conveyed the said above tracts of land to the defendants here, A. B. Ballard and Mrs. Josephine W. Ballard. The record of the said deed in the Recorder's office is here referred to, and a copy thereof will be produced on or before the hearing if required.

(3.)

The defendants were thus the owners of the said above described tracts of land, on the 21st day of December, 1897, when the suit was begun in this court, styled the Board of Directors of the St. Francis

Levee District *vs.* the Memphis Land and Timber Co. and others, being the same suit in the caption of this answer mentioned.

These defendants were not made parties by name to the said suit, *as* they have never heretofore appeared therein. They had no knowledge or notice of the commencement or pendency of the said suit, until after the proceedings hereinafter to be stated had been had. The defendant, Josephine W. Ballard, was during all that time, and is yet, a citizen of the State of Georgia, residing therein, and outside the limits of the State of Arkansas, and the defendant, A. B. Ballard, was during all that time a citizen of the State of Florida, and residing in that State, and outside of the limits of the State of Arkansas. They had no knowledge or notice of the levy of the Levee taxes sued for, or of the legislation of the General Assembly authorizing the same.

(4.)

These defendants claim that they were never legally or properly brought before the Court here, by any lawful Warning Order or other publication, or other constructive service of process, in the said suit.

32 Nor have they had any such notice of this suit, or the pendency thereof, as binds or concludes them by the proceedings and decrees therein, or so as in any way to affect or impair their title to the tracts of land aforesaid, hereinbefore described, by the sale thereof, and proceedings with respect thereto, hereinafter to be stated.

(5.)

No sufficient affidavit of the plaintiff herein was filed in the Clerk's office of this Court, at, or after the commencement of this suit, stating positively or sufficiently any one of the facts required by the statute, Sandels & Hill's Digest Sec. 5679, or any other statute applicable in the premises, authorizing the Clerk of this Court to make an order upon the complaint herein, or otherwise warning these defendants, or either of them, to appear in this suit as required by law.

The Clerk of this Court did not make upon the complaint in this cause, or otherwise, any other order warning these defendants, or either of them, to appear in this suit, as required or obliged them to appear therein, or bound them by the proceedings which have been had therein.

No such publication has ever been made of any such warning order in this cause, as required or obliged these defendants to appear in this suit, or as had the effect of binding them by the proceedings which have been had.

No such proof has been made in this suit of the publication of any warning order therein, as has established the fact that any warning order has been properly and sufficiently published, or as conferred upon this court jurisdiction of these defendants personally, or with respect to the said tracts of land, before described, or either of them.

These defendants here positively deny that they or either of them,

or the lands before described, have ever been brought before this court or within its jurisdiction, or that it has ever had any power to decree the sale of same, or pass the title.

33 (6.)

These defendants were not, nor was either of them, stated in the Complaint in the said suit, to be the owners of the said tracts of land, or either of them, nor were they, or either of them, stated to be the persons who claimed to be the owners of the said tracts of land.

The evidence of the title of these defendants to the said tracts of land, appeared of record as aforesaid, in the office of the Commissioner of State Lands, and also of record in the office of the Recorder of Crittenden County, Arkansas. The ownership of the lands was therefore known to be the plaintiff herein, the Board of Directors of the St. Francis Levee District, and it has never been alleged in the said complaint, or elsewhere in the said suit, that the ownership of the said tracts of land was unknown to the plaintiff in this suit, the Board of Directors of the St. Francis Levee District. And the said tracts of land, or either of them, to the unknown owners thereof. Nor has it ever been alleged in any such notice, nor in the complaint herein, as before stated, nor in any other pleading in this suit, that the owners of the said tracts of land, or either of them, were unknown to the plaintiff in this suit, the Board of Directors of the St. Francis Levee District.

And no notice of the pendency of the suit as against non-residents of the County of Crittenden, and unknown owners respectively, with reference to the said tracts of land, when this suit was pending, has ever been given by publication weekly, for four weeks prior to the first day of a term of this Court, or prior to the day of the term thereof, on which the final judgment complained of for the sale of the said lands was entered. And so these defendants say that the judgment or decree hereinafter stated, was rendered or pronounced without notice to these defendants, actual or constructive, and that the same and the proceedings thereunder, have always been and are null and void.

34 (7.)

The judgment or decree of this Court in this suit, of the 14th. day of February, 1898, found and decreed that the Northeast quarter of section 31, mentioned above, was indebted to the plaintiff herein for certain levee taxes, to wit: in the sum of $17.53 as more fully appears by the said judgment, or decree.

It also found and adjudged that the west half, and the South east quarter of section 32, embracing the Southwest quarter of Section 32, one of the tracts above described, and also embracing the south half of the North West quarter of Section 32, another of the tracts above described, as one compact body, and containing about 480 acres of land, was indebted to the plaintiff here for certain Levee taxes, in another aggregate sum to wit:—the sum of $77.27, as more fully appears by the said judgment or decree.

These defendants had no title to, or interest in, the North half of the North West quarter of said section 32, nor in the South east quarter of said section 32, but their said tracts of land, to wit:—The southwest quarter of Section 32, and the south half of the North West Quarter of Section 32, were taxed and charged jointly along with the said other tracts, in which they had no title or interest, for the amount of the taxes on the whole 480 acres, to wit, $77.27, and the same were adjudged or decreed to be sold therefor.

For the reason just stated, these defendants claim and insist that the said judgment or decree as to the said South West Quarter of Section 32, and the South half of the North West Quarter of Section 32, and the sale thereof, made thereunder, as will be hereinafter stated, were absolutely null and void.

35 They also claim and insist that the said judgment or decree, and the sale thereunder, were and are void, for the reasons hereinbefore stated and the reasons hereinafter to be stated.

The said judgment or decree of the 14th. day of February, 1898, adjudged and decreed that the three tracts of land herein first described, to wit: The North East quarter of Section 31: the Southwest quarter of Section 32, and the South half of the Northwest quarter of Section 32, were indebted in the manner before stated to the plaintiff herein in the sums before stated, and that the same constituted a lien on the said tracts of land respectively, and that the clerk of this court, as Commissioner, sell the said tracts of land to the highest bidder for cash, having first advertised the said lands for sale in some newspaper for two weeks weekly, and that he execute a deed of conveyance to the purchaser thereof, and receive therefor a fee of $1.00.

It is further decreed that there should be allowed the said Commissioner fees as follows:—For furnishing the printer with a list of the lands to be advertised, 5c. per tract: for attending and making and reporting the sale 25c. per tract: and that there should be allowed to the printer for publishing the said notices, 50c. per tract, which fees should be taxed as costs against the said several tracts of land, to be paid by the purchaser, or person discharging the lien before the sale.

These defendants submit that these provisions and requirements of the decree were unauthorized, and rendered the same void. The said judgment or decree then required the Commissioner to report his proceedings thereunder to the Court here at the next term.

36

(8.)

J. T. Haden, the Clerk of the Court here, appointed Commis-ioner, as before stated, filed his report of the sale made by him under the said decree, on the 20th. day of July, 1898, as more fully appears of record in Court here.

In the said report he stated that he had sold the North East quarter of Section 31, containing 160 acres, to A. Hackler, who, as these defendants are informed, and believe and state is a married woman, and the wife of J. P. Hackler, for the sum of $18.50; and that he had sold the West half, and the South east quarter of Sec-

tion 32, as one compact body, containing 480 acres, to C. W. Hunter, for $78.25.

The said report, as these defendants are informed, and believe and state, has been confirmed by a decree of this Court rendered at its last term, but for certainty as to that matter, they here refer to the record remaining in Court, as they have no knowledge.

They state, however, upon information and belief, that no deeds have been made by the said Haden, as Commissioner, either to the said A. Hackler, or to the said C. W. Hunter, for either of the said tracts of land so purchased by them, or if such deeds have been in fact executed, that this court has not heretofore sanctioned or ratified or approved any such deeds.

As soon as these defendants ascertained *of* the sale of their lands to the said A. Hackler, and C. W. Hunter, to wit: about the 10th. day of March, 1899, they tendered to each the said A. Hackler, and her husband J. P. Hackler, and to the said C. W. Hunter, the purchasers thereof, the sums they had bid and paid out for the said tracts of land, and such additional sums as they were entitled to, or considered themselves entitled to, in order to permit or allow the redemption of the said tracts of land respectively. They then --

37 there asked the said A. Hackler, and J. P. Hackler, her husband, and the said C. W. Hunter, to designate the sums they demanded for such redemption. Each refused to name any sum that would be received, and denied the right of these defendants to make redemption at all, and claimed and insisted that they had acquired the absolute title to the said tracts of land respectively, by their said respective purchases, and were the owners thereof, and that these defendants had no title thereto, or interest therein.

These defendants claim and insist for the reason before stated and the reasons hereinafter to be stated, that the said sales and purchases were and are absolutely void. They state further that they had no notice of the pendency of this suit, or of the said sale before stated, or the confirmation thereof, until after the said confirmation had taken place, and was completed. They have, therefore, had no opportunity of appearing in this suit, or of objecting to the confirmation of the said report of sale, since they received notice of this suit, or the said sale, until the present time, which is their first opportunity. They bring into Court, and here offer to pay to the Clerk, or as the Court may order, such sums as are required to be paid to redeem the said lands, and they pray the Court to fix the amounts.

(9.)

These defendants further state that the recital in the decree or judgment of sale herein, of the 14th. day of February, 1898, before referred to, that they, or either of them, by name, or by description, or as unknown owners of the tracts of land before described, or any tracts of land proceeded against in this suit, had been severally constructively summoned to appear in the said suit, by publication in a newspaper published in Crittenden County, Arkansas, weekly

for four weeks, before the date of the said judgment or decree, and that proof of such fact had been previously filed in this suit, was and is entirely untrue. They deny the same. They here take issue thereon and ask the leave of the Court to contest the truth thereof, and to produce evidence, and make proof on the subject, to the contrary.

38 These defendants further state and show that nothing in the complaint herein, when taken as confessed, as the judgment or decree recites it was, authorized or justified the said decree or sale against these defendants, or either of them, or with respect to their said tracts of land, or either of them.

No testimony was introduced therein as to the liability of these defendants, or either of them, or their said tracts of land, for the said sums so adjudged or decreed against them respectively, as before stated. And the Court here was not authorized to award a decree *pro confesso* against these defendants, or either of them, or as to their lands, in favor of the plaintiff here for the amounts of the taxes, interest, penalties and costs, claimed to be due, as more fully appears by the said judgment or decree, which is now here referred to.

And for the reasons before stated, and the reasons hereinafter to be stated, these defendants insist that the said judgment or decree as to them, and their said tracts of land, is without authority, and absolutely void.

(10.)

And these defendants particularly attack and deny the valid-ty of the following provisions of the Statute on which the suit herein is based, and on which the judgment and decree aforesaid and the sale thereunder, are rested, to wit. Those provisions of Act #71, of the Acts of the General Assembly of the year 1895, approved on the 2nd. day of April, 1895, which declare: That notice of the pendency of such suit shall be given as against non-residents of the County, and unknown others respectively, when such suits may be pending, by publication weekly, for four weeks prior to the day of the term of the court on which judgment may be entered for the sale of the land, in some newspaper published in the County where such suit may be pending, then give the form of the notice and provide that there shall follow it a list of supposed owners, with a descriptive list of the delinquent lands, and the amounts due

39 thereon respectively, and a conclusion to such notice.

And those declaring: That as against any defendant who resides in the County where such suit may be brought, and who appears by the record of deeds in said County, to be the owner of any lands proceeded against, notice of the pending suit shall be given by the service of personal summons of the Court, at least twenty days before the day on which the said defendant is required to answer as set out in the summons, and that actual service of summons shall be had, where the defendant is in the county, or where there is an occupant upon the land. And that the said suit shall stand for trial at the first term of the Court after complaint may be filed, if such four weeks, in the case of a non-resident, or unknown owner, as

aforesaid, or said twenty days in the case of a resident defendant, as aforesaid, shall expire, either before the first day of the term, or during the term of Court, in which said suits are brought respectively, unless a continuance is granted for good cause, shown, within the discretion of the Court. And that in all cases where notice has been properly given, as aforesaid, and where no answer has been filed, or if filed, and the cause decided for the plaintiff, the Court by its decree, shall grant the relief as prayed in the complaint, and shall direct the said Commissioner to sell the lands described in the decree, at the Court House door of the County wherein the decree is entered, at public outcry to the highest bidder for cash in hand, after first having advertised such sale weekly for two weeks consecutively in some newspaper published in the County, or otherwise, as prescribed.

And that the said Commissioner shall by proper deeds convey to the purchasers the lands so sold, and that the titles to said lands shall thereupon become vested in such purchaser, as against all others whomsoever, saving to infants and insane persons the rights given them by section 12 of the Acts of February 15th. 1893.

40 And that said suit shall be conducted in accordance with the practice and proceedings of the Chancery Courts in this State, except as in the Act is otherwise provided: except that neither attorneys nor guardian *ad litem,* nor any provision of Section 5877 of Sandels & Hill's Digest of the Statutes of Arkansas, shall be required: and except that said suits may be disposed of on oral testimony, as in ordinary suits at law. And that this law shall be liberally construed to give said assessment lists the effect of *bona fide* mortgages for a valuable consideration, and a first lien upon the said land as against all persons having an interest therein. And that no informality, or irregularity in holding the meetings, or in the description or valuation of the lands, or in the names of the owners, or the number of acres therein, shall be a valid defense to such action.

So far as the said provisions affect the rights of these defendants to the tracts of land aforesaid, or either of them, or in this suit, their validity is denied. It is claimed that they and each of them are unconstitutional and void, so far as they affect or impair such rights. And the acts done under them are void.

The said provisions of said Act, and the said proceedings thereunder, violate Section 8, Article 2, of the Constitution of the State of Arkansas, providing that no person shall be deprived of life, liberty, or property, without due process of law.

They also violate that provision of Section 18, Article 2, which provides that the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all other citizens.

They also violate that provision of Section 21, Article 2, which provides that no person shall be disseized of his estate, freehold, liberties, or privileges, or in any manner deprived of his property, except by the judgment of his peers, or the laws of the land.

41 They also violate that provision of Section 25, Article 5 of the Constitution, which provides that in all cases where a general law can be made applicable, no special law shall be enacted,

nor shall a portion of any general law be suspended by the legislature for the benefits of any particular individual, corporation, or association, nor where the courts have jurisdiction to grant the powers, or the privileges, or the relief asked for.

They also violate clause 1, Section 2, Article 4, of the Constitution of the United States, which declares that the citizens of each State, shall be entitled to all the privileges and immunities of citizens in the several states. They also violate that provision of the 14th Amendment to the Constitution of the United States, which declares that no state shall make, or enforce any law, which shall abridge the privileges or immunities of citizens of the United States: Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

For the reason that the said legislation, and the said portions of the said judgment or decree of this Court, and the proceedings thereunder, are in conflict with the State Constitution, and the Constitution of the United States, in the particulars stated, and are therefore void, these defendants claim and insist that the said judgment or decree, and the sales made thereunder, and the report of sale, and the confirmation thereof, and any deed or deeds which have been made, are null and void, and should be set aside.

(11.)

The said C. W. Hunter, named above, and the purchaser of a portion of the tracts of land above described, is a non-resident of the State of Arkansas, and resides in the State of Tennessee. The said A. Hackler, and J. P. Hackler, her husband, are citizens of the State of Arkansas, and reside in Crittenden County. Neither of them are in possession or occupation of either of the said tracts of land.

42 *Prayer.*

In consideration of the Premises, the above named A. B. Ballard, and Josephine W. Ballard, pray that the foregoing may be taken and considered, and have the effect of their answer to the original complaint herein, and motion based thereon, as provided by the Statute, Sandels & Hill's Digest of the Statutes of the State of Arkansas, Sec. 5882.

Also, and if necessary to their relief, that it may be taken and considered as their Petition, under Sec. 5839-5843, of Sandels & Hill's Digest.

Also, and if necessary to their relief, that it may be taken and considered as an original complaint, and ordered to be filed, and to stand and proceed as such, under Sec. 4197-4199, of Sandels & Hill's Digest, and under Sec. 6120-6124, and the amendments thereto.

And also, if it be necessary to their relief, that it be taken as a Bill of Review of the decrees and proceedings in the above styled suit of the Board of Directors of the St. Francis Levee District against the Memphis Land & Timber Co. and others, Equity Docket No. 589.

That all the parties to the said suit, in which the said judgment or decree has been so rendered, and the said proceedings thereunder have been so had, including the plaintiff, the Board of Directors of the St. Francis Levee District, and the said C. W. Hunter, and the said A. Hackler, and J. P. Hackler, her husband, the purchasers of the said tracts of land, as before stated, may be considered and treated as defendants to this Petition, Motion and Complaint, and as before the Court for all the purposes of their relief herein prayed. Or, if necessary, that *that* said A. Hackler, and J. P. Hackler, her husband, and the said C. W. Hunter, the purchasers respectively, of the tracts of land herein involved, as before stated, may be brought before the Court by the proper service of summons on them per-
43 sonally, or by the proper publication of the necessary warning order in such cases, and made defendants.

That on the final hearing, the decree of sale entered in the said suit, above described, on the 14th day of February, 1898, and all subsequent decrees therein, affecting them personally, or the said tracts of land, or their interests therein, may be reviewed, reversed, vacated, set aside and held for naught.

That the decree entered as hereinbefore stated, in the said suit, confirming the sales of the said several tracts of land before described, to the said C. W. Hunter and A. Hackler, respectively be vacated, set aside and held for naught; and that the said report of sale be set aside, vacated and cancelled, and the sales of the said tracts of land made respectively to the said C. W. Hunter and A. Hackler, be vacated, set aside and held for naught.

That any deeds which may have been executed by the Commissioner to either the said C. W. Hunter, or the said A. Hackler, or any one claiming under or through them, by assignment, or otherwise may be cancelled, vacated and held for naught.

That their title to the said tracts of land may be cleared, and quieted, and confirmed, and declared to be complete and perfect against the proceedings in the said suit, and all the parties thereto. That they may be permitted to pay the taxes justly and legally due to the plaintiff, the Board of Directors of the St. Francis Levee District, on the said tracts of land, including all penalties, interest and costs, properly chargeable thereon, and they here bring into Court and offer to deposit or pay, according to its direction, the sum or sums of money requisite or necessary for the said purpose. Or if proper, and according to the course of the law, and the practice of the Court, they pray that they may be allowed to redeem the said tracts of land from the said C. W. Hunter and A. Hackler, and J. P. Hackler, her husband, respectively, by paying them severally and respectively, the sums of money to which they are entitled, in
44 order to effect such redemption, and they here bring into Court, and offer to pay or deposit, according to its direction, the sum or sums of money necessary to effect such redemption. Or if more appropriate and according to the law in such cases, that they be allowed to increase the bids of the said C. W. Hunter and A. Hackler, respectively, for the said tracts of land, as appears from the records of sale aforesaid, and they hereby offer to increase such bids

by the amount of fifty per cent. (50%) thereof, upon each bid respectively, and they here bring into court, and offer to deposit or pay, according to its direction, the sum or sums of money necessary to make good their respective bids for the said tracts of land, as so increased.

They also pray the proper judgment against the said adverse parties for costs herein. And they pray for all other just necessary and proper relief.

(Signed) RANDOLPH & RANDOLPH,
Att'ys, &c.

STATE OF FLORIDA, *County of Hillsboro:*

I, A. B. Ballard, named in the foregoing Answer, Petition and Complaint, do solemnly swear that the facts therein set forth are true, to the best of my knowledge, information and belief.

(Signed) A. B. BALLARD.

Subscribed and sworn to before me, a Notary Public in and for the said County and State, as witness my hand and seal of office as such Notary Public, at Tampa, in the said County and State. September 5th, 1899.

(Signed) D. F. CONOLEY,
Notary Public.

45 [Endorsed:] No. 589. The Board of Directors of the St. Francis Levee District *vs.* The Memphis Land and Timber Co. and Others. Answer, motion, petition and original complaint of A. B. Ballard and Josephine W. Ballard. N. E. ¼ Sec. 31, S. W. ¼ Sec. 32, S. ½ of N. W. ¼ Sec. 32, T. 4 N. R. 7 E. Filed Sept. 25th, 1899. J. T. Haden, Clerk, By R. F. Ward, D. C. Randolph & Randolph.

46 *Agreement of Counsel.*

Crittenden County Chancery Court Record "H."

September Term, 1900, Page 142.

BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND AND TIMBER CO. ET ALS.

It is agreed that without any plea by C. W. Hunter to the answer, motion, petition or bill of review or original complaint of A. B. Ballard and Josephine P. Ballard in the above entitled cause that the matter there presented shall be heard as an agreed case upon the agreed statement of facts heretofore filed in this cause and the evidence therein referred to.

RANDOLPH & RANDOLPH,
For A. B. BALLARD AND
JOSEPHINE P. BALLARD.
L. P. BERRY,
For C. W. HUNTER.

47 *Agreement of Counsel.*

In the Chancery Court of Crittenden County, Ark.

589.

BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT, Plaintiff-,
vs.
MEMPHIS LAND AND TIMBER COMPANY AND OTHERS.

It is agreed that without any plea by C. W. Hunter to the answer, motion, petition or Bill of Review or original complaint of A. B. Ballard and Josephine Ballard in the above entitled cause that the matters there presented shall be heard as an appeal case, upon the agreed statement of facts heretofore filed in this cause and the evidence therein referred to.

RANDOLPH & RANDOLPH,
For A. B. BALLARD AND
JOSEPHINE BALLARD.
L. P. BERRY,
For C. W. HUNTER.

It is ordered that the above agreement be put of record.

48 *Agreed Statement of Facts.*

In the Chancery Court of Crittenden County, Arkansas.

Equity Docket # 589.

BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT, Plaintiffs,
vs.
MEMPHIS LAND AND TIMBER COMPANY AND OTHERS, Defendants.

In the matter of the controversy between A. B. Ballard and Josephine W. Ballard on the one part, and A. Hackler, wife of J. P. Hackler, and C. W. Hunter on the other part, arising upon the answer and motion of the said A. B. Ballard and Josephine W. Ballard, filed herein on the 25th day of September, 1899, and the answers or replies thereto of the said A. Hackler, J. P. Hackler, and C. W. Hunter for the purposes of the trial of the Issues between the said parties, presented as above.

The following state of facts is hereby agreed on and this agreement is to have the effect of proof duly made upon the said issues as to the basis for a decision of the controversy between the said parties.

(1.)

It is agreed that A. B. Ballard the ancestor, who was the father of A. B. Ballard and husband of Josephine W. Ballard, and who died

intestate many years ago, leaving the one his widow, and the other his heir at law, acquired the several tracts of land to wit: Northeast ¼ of Section 31, the Southwest quarter of Section 32, and the South ½ of the Northwest ¼ of Section 32, all in Township 4, North Range 7 East, at the times and in the manner stated in paragraph 1, of the said answer of the said A. B. Ballard and Josephine W. Ballard, mentioned above.

49 It is further agreed that the muniments of title or deeds by which the said parties held the said lands were all of record in the office of the Recorder of Crittenden County, prior to the 1st day of January, 1893.

(2.)

It is further agreed that in the suit in the Crittenden Circuit Court styled State of Arkansas on the relation of Crittenden County, Plaintiff, *vs.* Jno. Crawford, Auditor and others, Defendants, the said lands described in the last preceding paragraph were condemned to be sold for the non-payment of taxes due the State of Arkansas, and the County of Crittenden.

It is further agreed that said lands were sold and were purchased by Thos. B. Turley, and that he transferred his purchase to the Memphis Land & Timber Co.

It is further agreed that A. H. Ferguson, Commissioner in the said suit conveyed the said land by a deed duly executed and duly approved by the Circuit Court in the said suit to the said Memphis Land & Timber Co., under the said purchase of the said Turley so assigned to the said Memphis Land & Timber Co.

It is further agreed that the Memphis Land & Timber Co. afterwards by a deed executed and acknowledged in due form of law conveyed the said tracts of lands to the said A. B. Ballard and Josephine W. Ballard.

The said facts are fully set out in paragraph 2 of the said answer of the said A. B. Ballard and Josephine W. Ballard. The deeds referred to in the said paragraph of the said answer or copies of the records thereof in the office of the Recorder of Crittenden County may be read in evidence by either party if desired.

(3.)

It is further agreed that the said A. B. Ballard and Josephine W. Ballard were the owners of the said land in the manner before stated on the 21st day of December 1897, when this suit was begun.

50 It is further agreed that Josephine W. Ballard at that time resided at Atlanta, in the State of Georgia, and that A. B. Ballard at that time resided in the State of Florida, at Tampa, and neither within the State of Arkansas.

It is further agreed that they have remained citizens and residents of Georgia and Florida respectively ever since the said date.

It is further agreed that each one of them would testify that they had no knowledge of the present suit, or i-s pendency, or that taxes for levee purposes had been levied by the Board of Directors of the St. Francis Levee District upon the said lands, prior to the date of

the sale of said lands in this suit, and the purchase thereof by the said C. W. Hunter and A. Hackler respectively, or that any law on that subject had been enacted.

(4.)

It is further agreed that the record of this suit including the original complaint and any amendment that may have been made thereto, and the warning order, or order of publication, and the proof of the publication thereof, any summons or other process that may have been issued in the course of the suit, and the returns of the sheriff, or other officer on all process, and the publication of the warning order or notice, made in the Marion Reform, a newspaper published in Crittenden County, and the pleadings and proceedings in this suit, including all the orders, judgments, and decrees on the minute book of the Court, and any and all reports of sale and deeds made by the Commissioner, having reference to the said lands described above, may be used, and read in evidence by either of the parties to this controversy for all the proper purposes thereof, subject only to the objections for irrelevancy and incompetency, all other objections being waived. And if the original record, process, pleadings, proof, or proceedings or other paper or record cannot be found, then a true or duly certified copy thereof may be produced and used in evidence in the place of the originals, and with the like effect.

51

(5.)

It is further agreed that the Clerk of this Court was allowed a fee of One Dollar ($1.00) for making the deed to each the said C. W. Hunter and A. Hackler conveying the lands conveyed to them respectively under the purchases made by them as stated above. And that the Clerk was allowed for furnishing the printer with a list of the said lands to be advertised, Five Cents (5c.) for each tract. And further he was allowed for attending and making a report of the sale, the sum of Twenty-five Cents (25c.) for each tract of the said land. And that the printer for printing and publishing the notices of the said lands was allowed the sum of Fifty Cents (50c.) for each tract of the said lands. And it is further agreed that the said sums were taxed as costs against the said lands described above, and were paid out of the proceeds of the sale thereof by the Commissioner after the sales had been completed by the purchasers.

(6.)

It is further agreed that the said A. B. Ballard and Josephine W. Ballard made the tenders to the said C. W. Hunter and A. Hackler respectively stated in Par. 8 of their answer and motion filed herein on the 25th day of September 1899, and in the manner and at the times stated in the said answer, and that the said C. W. Hunter and A. Hackler respectively refused to receive such tenders, and severally refused to state the amounts that they claimed they were entitled to receive in order to redeem the said tracts of land respectively. This agreement shall be filed as a part of the record of the suit and treated as such in the Court below and in the Court of Appeals, should the

case be taken there and either party is to have the benefit thereof for the purposes of the said suit and the appeal.

Done this 11th day of September 1900.

RANDOLPH & RANDOLPH,
For A. B. BALLARD &
JOSEPHINE BALLARD.
L. P. BERRY,
For C. W. HUNTER.

52 [Endorsed:] Eq. Docket #589. Board of Directors of the St. Francis Levee District *vs.* Memphis Land & Timber Co. *et als.* Agreed State of Facts. Controversy between C. W. Hunter, A. Hackler, and A. B. Ballard and Josephine W. Ballard. Filed Sept. 24th, 1900. J. T. Haden, Clerk, By R. F. Ward, D. C. Randolph & Randolph.

53 *Deed to A. Hackler.*

This indenture, made this 16th. day of January, 1899, by and from J. T. Haden, as Commissioner in Chancery, party of the first part hereto, and A. Hackler, party of the second part hereto, witnesseth: Whereas, at a term of the Chancery Court, begun and held in and for the County of Crittenden and of the State of Arkansas, on January 17th. 1898, it was by said Court, on the 14th. day of February, 1898, a day of said term, among other things, ordered, adjudged and decreed in a certain cause then pending therein, between the Board of Directors of the St. Francis Levee District, as Complainant, and the Memphis Land & Timber Co. *et als.* were defendants, that one—Myers Sneed, Wood & Hill & A. B. Ballard (he being one of said defendants in said cause) pay to the Board of Directors of the St. Francis Levee District complainant in said cause, the sum of Sixty One and 21/100 Dollars, as taxes, interest, penalty and costs, due to said Board of Directors St. Francis Levee District, from said defendant above named for the years 1894, 1896, 1897, on the following lands, lying, situate and being within the limits of the St. Francis Levee District, in said Crittenden County to wit:

N.	½	Section	21,	T. 3	N.	R. 7	E.	220 acres,
N. W.	¼	"	29,	T. 4	N.	R. 7	E.	160 "
S. W.	¼	"	30,	T. 4	N.	R. 7	E.	160 "
N. E.	¼	"	31,	T. 4	N.	R. 7	E.	160 "

which sum of money was adjudged by said decree to be a first lien on said described real estate as against all persons having an interest therein, and that, in default of such payment, said described lands to be sold by the party of the first part (who was herein appointed Commissioner of said Court for that purpose) at public outcry, to the highest bidder, for cash in hand, at the front door of the court house of Crittenden County, within legal hours, June 14th. 1898, after giving notice of the time, terms and place of sale, by publishing such notice in some newspaper of general circulation published in said Crittendent County, weekly, consecutively for two weeks; and if

all of said lands were not sold on said day, the sale to be continued from day to day till completed; and whereas, the said sum of money, penalty, interest and costs as aforesaid, being and remaining wholly unpaid, said party of the first part, as such Commissioner, in pursuance of the orders and directions contained in said decree, gave notice of the time, place and terms of sale of said lands, by publication thereof in the Marion Reform, a weekly newspaper of general *bona fide* circulation, published in Crittenden County, for two weekly insertions consecutively, and did proceed on said day as advertised, between nine o'clock A. M., and three o'clock P. M. and offered said lands for sale at public outcry, to the highest bidder, at the front door of the courthouse of said Crittenden County, and at such sale so made and had the said party of the second part bid and offered for said lands the sum of Sixty One and 21/100 Dollars, and he being the highest and last bidder, the same was then and there publicly struck off and sold to A. Hackler for that sum; and whereas, the said sale was duly reported at the July 1898 term of said Court, and duly approved, and the undersigned Commissioner directed to make a deed to the purchaser.

Now, therefore, This indenture witnesseth, that the said J. T. Haden, as Commissioner in Chancery aforesaid, and party of the first part to these presents, in order to carry into effect the sale made as aforesaid, in pursuance of the decree of said Chancery Court, in consideration of the premises and the sum of Sixty One and 21/100 Dollars, hath granted, bargained and sold, and by these presents does grant, bargain, sell and convey unto the said A. Hackler as party of the second part hereto, and to her heirs and assigns forever, all the right, title, interest or claim, either in law or in equity, of the parties to said suit in Chancery, and of all other persons or claimants having an interest in or to said lands described as aforesaid, and all and singular the rights and privileges, hereditaments and appurtenances thereunto belonging or in anywise appertain-
54 ing.

To have and to hold said lands, with all appurtenances thereto, unto the party of the second part and her heirs and assigns forever.

In witness whereof, The party of the first part hereunto sets his hand and affixes his seal as such Commissioner in Chancery, on the day first above written.

J. T. HADEN,
Commissioner in Chancery.

Examined and approved in open Court this 16th. day of January 1899.

E. D. ROBERTSON, *Chancellor.*

Acknowledgment.

STATE OF ARKANSAS, *County of Crittenden:*

In the Crittenden Chancery Court, at the January, 1898, Term Thereof, 16th Day of January, 1899.

In Chancery. # 589.

BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND AND TIMBER CO. ET AL.

On this day, J. T. Haden, the Commissioner appointed to execute the decree rendered in this cause, produces to the Court here his deed to A. Hackler, the purchaser of part of the lands and premises mentioned and described in said decree, and upon examination of said deed the same is, in all things, approved. And thereupon the said J. T. Haden, here in open Court, acknowledges that he has executed said deed to said A. Hackler for the lands and premises therein described, to wit:

N. E. ¼ Sec. 31 T. 4 N. R. 7 E. 166 acres,
N. ½ Sec. 21 T. 3 N. R. 7 E. 220 acres,
N. W. ½ Sec. 29 T. 4 N. R. 7 E. 160 acres,
S. W. ¼ Sec. 30 T. 4 N. R. 7 E. 160 acres,

for the consideration and purposes therein mentioned and set forth; and it is ordered by the Court that a copy of this order and acknowledgement be entered upon said deed, and certified by the Clerk under the seal of this Court, to the end that same may be entitled to record.

In testimony that the above and foregoing order and acknowledgement is a true and complete copy from the record of the proceeding of the Chancery Court of Crittenden County, I, J. T. Haden, do hereby set my hand as Clerk and affix the seal of said Court, at my office, in said County, this 16th. day of January, 1899.

J. T. HADEN, *Clerk.*

Certificate of Record.

STATE OF ARKANSAS, *County of Crittenden:*

I, J. T. Haden Circuit Clerk and Ex-Officio Recorder of the County aforesaid do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 16th. day of January 1899 at 3 o'clock P. M. and the same is now duly recorded with the acknowledgement and certificates thereon in Record Book L "2" on page 1.

In witness whereof I have hereunto set my hand and affixed the seal of said Court this 16th. day of March 1899.

[SEAL.]

J. T. HADEN,
Circuit Clerk and Ex-officio Recorder,
By R. F. WARD, *D. C.*

55 *Order Submission.*

Crittenden County Chancery Court, Record "H."

September Term, 1900, Page 153.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND AND TIMBER CO. ET ALS.

In the matter of controversy between Richard H. Allen, John Fritz and others on the one side and C. W. Hunter and others and in the matter of controversy between A. B. Ballard and Josephine W. Ballard on the one side and C. W. Hunter and A. Hackler and J. P. Hackler on the other.

The above cause as to the said matters in controversy between the said parties is this day heard by the Court and after having been argued by the counsel of the respective parties the same are taken under advisement by the Court. This order was made on the 26th day of September 1900, the third day of this Term and is now entered for then.

56 *Answer, Motion, and Bill of Review of R. H. Allen et al.*

In the Chancery Court of Crittenden County, Arkansas.

Equity Docket, #589.

BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT
vs.
MEMPHIS LAND AND TIMBER COMPANY AND OTHERS.

For the Collection of Levee Taxes for the Year 1897.

To the Hon. E. D. Robertson, Chancellor:

The answer and motion and petition and bill of review of Richard H. Allen, Harry Allen, Mary L. Latham, and John C. Latham her husband, Ellen Allan, Thos. H. Allen, Jr., a minor by his next friend and guardian *ad litem*, Floy G. Allen, John C. Latham in his own right, John B. Leach, John Fritz, The Phœnix Fire & Marine Insurance Co., the Memphis Savings Bank, both corporations of the State of Tennessee, the City National Bank, a national bank under the act of Congress, located at Cairo, Illinois, and C. W. Edmonds, as Successor of Albert G. Mitchell, deceased, and as assignee of the Hill Shoe Co., also a corporation of the State of Tennessee.

The lands hereinafter described are in litigation in the suits hereinafter referred to, as will more fully appear by the records of the

said suits respectively, to which reference is now here made, as a part of this answer, motion, petition and bill. Nothing herein contained *shall effect or impair or in any way prejudice the rights of the* parties thereto, nor any of them, as amongst themselves, or against each other, with respect to the said lands, or any part of them, or any right thereto, or claim or interest therein, but the same shall remain as if this answer, motion, petition and bill, had not been filed.

57 (1.)

The above named parties state and show to the court that prior to March 27th, 1889, Thos. H. Allen, now deceased, was the owner in fee and in possession of the following described lands, in Crittenden County, Arkansas, to wit:—The east fractional 1/2 of Section Fifteen (15) South half of section 10; the N. W. 1/4 of section 10, all of section 9, the west 1/2 of Section 4, and the Southeast 1/4 of Section 4, the West half of the N. E. 1/4 of Section 4, and the West 1/2 of the S. W. 1/4 of Section 3, all in township 3 North, Range 7 East, and containing together about 2080 acres of land. Being so the owner of the said lands, and so in possession of them, the said Thos. H. Allen on March 27th, 1889, aforesaid, by a title bond of that date, afterwards duly acknowledged and prescribed by law on February 1st, 1893, and of record in the office of the recorder of Crittenden County in Book G, Vol. 2 p. 109, to which reference is here made, bargained and sold to John Fritz of the County of Crittenden the said above described tracts of land, and each and all of them. For the said land the said John Fritz agreed to pay Thos. H. Allen $18,720.00 evidenced by promissory notes described in the said title bond.

It was also agreed in the said title bond that when the said John Fritz should pay all the said notes the said Thos. H. Allen or his heirs and representatives should make or cause to be made to the said Fritz a good and warranty deed to the said described lands or to his executor or administrator. The said Thos. H. Allen thereupon put the said John Fritz into the actual possession of all the said lands, and the said John Fritz by virtue of his interest and title under the said title bond has remained the owner and in possession of the said lands, ever since the said March 27th, 1889.

The said Thos. H. Allen afterwards died intesta e a resident and citizen of the State of Tennessee, leaving his surviving as his heirs at law, Richard H. Allen, Thos. H. Allen Jr., citizens and
58 residents of the State of Tennessee, and Harry Allen, a citizen and resident of the State of Louisiana, and Mary L. Latham wife of John C. Latham a resident and citizen of the State of New York and Mrs. Ellen Allen his widow a resident and citizen of the State of Tennessee. Since the death of Thos. H. Allen, the said Thos. H. Allen Jr., has departed life intestate leaving as his heirs at law his son Richard H. Allen Jr., and also his widow Floy G. Allen, residents and citizens of the State of Tennessee. The said Richard H. Allen is a minor under the age of 21 years. The other parties are all adults. All of them are named above as parties hereto.

(2.)

After the said title bond had been so executed by the said Thos. H. Allen, and after the said notes had been so executed and delivered to him by the said John Fritz, as stated in the said title bond, John B. Leach became the holder of the following described of the said notes to wit:—One due November 1st, 1892, for $4000.00, one due November 1st, 1893 for $5000.00, both bearing interest at 6% per annum from maturity.

On April 10th, 1893, the said John B. Leach filed his complaint in equity in the Circuit Court of Crittenden County for the purpose of recovering the amount of the said two notes, and of enforcing the lien resulting from the said title bond on the said land described above, and thereby to compel the payment of the said notes. He made among other parties John C. Latham one of the parties hereto a defendant. The defendant to the said suit appeared therein and filed answers to the said complaint, and the said suit is yet pending in court here, and to the record of the same the parties hereinbefore named here refer for particularity and certainty.

By Virtue of the said suit and the holding of the said title bond, the said John D. Leach claimed a lien upon and interest in the said lands. Since the said suit was begun and while pending the said John D. Leach departed life and has qualified —— —— as his administrator, and the same has been revised in his name as
59 such administrator. The said —— —— as such administrator now claims the same lien on and interest in the said lands as those claimed by the said John D. Leach as above stated. He also makes himself a party hereto.

(3.)

The said John C. Latham made a defendant in the said suit last stated brought by John D. Leach appeared therein and filed his answer and cross complaint on July 8th, 1893. In his said answer and cross complaint he set up the title bond aforesaid so executed by the said Thos. H. Allen to the said John Fritz, and claimed and stated that he was the owner of the following described notes mentioned in the said title bond, to wit:—

One	due	November	1st,	1890,	for	$1000.00
"	"	"	"	1891,	"	2000.00
"	"	"	"	1894,	"	6720.00
"	"	"	"	1890,	"	6720.00
"	"	"	"	1890,	"	1815.84
"	"	"	"	1891,	"	1063.20
"	"	"	"	1892,	"	943.20
"	"	"	"	1893,	"	703.20
"	"	"	"	1894,	"	403.20

In his said cross complaint he claimed the right to enforce the payment of the said notes, and to foreclose the lien resulting from the said title bond upon the said above described land for the payment thereof. The said cross complaint in the said suit remains un-

disposed of and is yet pending. In consequence of the said title bond and the holding of the said notes, and the said suit the said John C. Latham claims he has a lien upon and interest in the said described land, to wit, that mentioned above.

(4.)

On June 30th, 1892, the Phœnix Fire & Marine Insurance Co. of the State of Tennessee, filed its complaint at law in the Circuit Court of Crittenden County against the said Thos. H. Allen, Thos. H. Allen Jr., Richard H. Allen and Harry Allen, partners *of* Thos. H. Allen & Co. they all being non-residents of the State of Arkansas. In the said complaint the said Company claimed the right to recover a large amount of debt owing it by the said Thos. H. Allen and Co. composed as aforesaid. On the said day an order of attach-
60 ment was issued in the said suit and delivered to the Sheriff of Crittenden County, and the same was afterwards levied by him upon the said above described tracts of land and each of them, as the property of the said Thos. H. Allen.

The said defendants in the said suit were given notice according to law of the pendency thereof, but failed to appear therein, and judgment was pronounced against them for the debt claimed by the said Phœnix Fire & Marine Insurance Co., in the said Crittenden Circuit Court, and the said above described property, so attached, was condemned for sale under the said attachment and ordered to be sold to satisfy and pay the debt sued for, which was therein adjudged to be due the said Phœnix Fire & Marine Insurance Co. from the said Thos. H. Allen & Co. An order of sale was ordered to issue upon the said judgment for the sale of the said property so attached and ordered to be sold. But by an injunction issued in a suit brought in the Circuit Court of Jefferson County in the State of Arkansas, and removed therefrom under the act of Congress to the Circuit Court of the United States for the Eastern District of Arkansas sitting at Little Rock, wherein Nellie Houchens was plaintiff and Thos. H. Allen and others were defendants, the said Phœnix Fire & Marine Insurance Co. the plaintiff in the said suit, and the Sheriff of Crittenden County having the execution of the said order of sale were enjoined from executing the said order, or making the said sale and the said injunction has always since continued in force and is yet in force, and the said matter is being litigated between the said parties to the said suit in the Circuit Court of the United States where the suit is yet pending. To the record and proceedings in the said suit in the said Circuit Court of Crittenden County so brought by the Phœnix Fire & Marine Insurance Co. reference is here now made for particularity and certainty, and the same is asked to be taken and considered a part thereof. By virtue
61 of the said proceedings the said Phœnix Fire & Marine Insurance Co. has and claims an existing lien on the said lands before described.

(5.)

On the same June 30th, 1892, the Memphis Savings Bank, a corporation of the State of Tennessee filed its complaint at law in the

Circuit Court of Crittenden County against the said Thos. H. Allen Jr. Richard H. Allen and Harry Allen, partners as Thos. H. Allen & Co., all being non-residents of the State of Arkansas. In the said complaint the said Memphis Savings Bank claimed the right to recover a large amount of debt owing it by the said Thos. H. Allen & Co., composed as aforesaid. On the said date an attachment was issued in the said suit and delivered to the sheriff of Crittenden County and the same was afterwards levied by him upon the said above described land, to wit, all hereinbefore mentioned. The said defendants in the said suit were given notice according to law of the pendency thereof but failed to appear therein, and judgment was pronounced against them for the debt claimed by the said Memphis Savings Bank in the said Crittenden Circuit Court and the said property so attached, to wit, all before described was condemned for sale under the said attachment, and ordered to be sold to satisfy the debt sued for, which was therein adjudged to be due the said plaintiff, the Memphis Savings Bank from the said Thos. H. Allen & Co.

An order of sale was ordered to issue upon the said judgment for the sale of the said property so attached, and so ordered to be sold. But an injunction was issued in a suit brought in the Circuit Court of Jefferson County, Ark., and removed therefrom under the Act of Congress to the Circuit Court of the United States for the Eastern District of Arkansas sitting at Little Rock wherein Nellie Houchens was plaintiff and Thos. H. Allen & Co. and others were defendants. The said Memphis Savings Bank the plaintiff in the said suit and the Sheriff of Crittenden County having the execution
62 of the said order of sale were enjoined from executing the said order or making the said sale, and the said injunction has always since continued in force, and is yet in force, and the said matter is being litigated between the said parties in the said Circuit Court of the United States where the suit is still pending. To the record and proceedings in Crittenden Circuit Court wherein the said property was attached and the said order of sale rendered, remaining of record there, the parties hereto here refer for particularity and certainty and pray that the same may be taken and considered as a part hereto. By virtue of the said proceedings the said Memphis Savings Bank has and claims a lien on the said land now existing.

(6.)

On August 6th, 1892, the City National Bank of Cairo, Ill., a national bank organized under the Act of Congress in that behalf and located at Cairo in the State of Illinois, filed its complaint at law in the Circuit Court of Crittenden County against the said Thos. H. Allen, Thos. H. Allen Jr., Richard H. Allen and Harry Allen, partners as Thos. H. Allen & Co., they all being non-residents of the State of Arkansas. In the said complaint the said City National Bank claimed the right to recover a large amount of debt owing to it by Thos. H. Allen & Co. composed as aforesaid.

On the said day an order of attachment was issued in the said suit and delivered to the Sheriff of Crittenden County and the same

was afterwards, to wit, on August 29th, 1892, levied by him upon the said above described land as the property of the said Thos. H. Allen. The said defendants in the said suit were given notice according to law of the pendency thereof, but failed to appear therein and judgment was pronounced against them for the debt claimed by the plaintiff the said City National Bank in the said Crit-
63 tenden Circuit Court and the said property so attached, to wit, all before described was condemned for sale under the said attachment and ordered to be sold to satisfy and pay the debt sued for, which was therein adjudged to be due to the said plaintiff the City National Bank from the said Thos. H. Allen & Co.

An order of sale was ordered issued upon the said judgment for the sale of the said property so attached and ordered to be sold, to wit, all before described, but by an injunction issued in a suit brought in the Circuit Court of Jefferson County, Arkansas, and removed therefrom under the Act of Congress to the Circuit Court of the United States for the Eastern District of Arkansas sitting at Little Rock wherein Nellie Houchens was plaintiff and Thos. H. Allen and others were defendants, the said City National Bank of Cairo, the plaintiff in the said suit, and the Sheriff of Crittenden County having the execution of the said order of sale, were enjoined from executing the said order, or making the said sale, and the said injunction has always continued in force and is yet in force and the said matter is being litigated between the said parties in the Circuit Court of the United States aforesaid, where the suit is pending. To the record and proceedings of the said suit so remaining in the said Crittenden Circuit Court wherein the said property was attached and ordered to be sold, as aforesaid, reference is now here made for particularity and certainty, and the same is asked to be taken and considered as a part hereof. By virtue of the said proceedings in the said Crittenden Circuit Court the said City National Bank of Cairo has an existing claim and lien upon the said lands before described.

(7.)

On August 16th, 1892, A. G. Mitchell as assignee of the Hill Shoe Company, a corporation of the State of Tennessee, filed his com-
plaint at law in the Circuit Court of Crittenden County
64 against Thos. H. Allen, Thos. H. Allen Jr., Richard H. Allen and Harry Allen partners, as Thos. H. Allen & Company, they all being non-residents of the State of Arkansas. In the said complaint the said Mitchell as such assignee claimed the right to recover a large amount of debt owing him as such assignee by the said Thos. H. Allen & Company, composed as aforesaid.

On the said day an order of attachment was issued in the said suit and delivered to the Sheriff of Crittenden County and the same was afterwards, to wit, on August 28th, 1892, levied by him upon the said above described lands as the property of the said Thos. H. Allen. The said defendants in the said suit were given notice according to law of the pendency thereof, but failed to appear therein and judgment was pronounced against them for the debt claimed

by the said Mitchell as such assignee in the said Crittenden Circuit Court and the said property so attached, to wit, that before described, was condemned for sale under the said judgment and was ordered to be sold to satisfy the debt sued for which was therein adjudged to be due the said plaintiff Mitchell as such assignee for the said Thos. H. Allen & Co.

An order of sale was ordered to issue from the said judgment for the sale of the said property so attached, and ordered to be sold. But an injunction issued in the suit brought in the Circuit Court of Jefferson County, Arkansas, and removed therefrom under the Act of Congress to the Circuit Court of the United States for the Eastern District of Arkansas sitting at Little Rock, wherein Nellie Houchens was plaintiff and Thos. H. Allen and others were defendants, the said Mitchell as such assignee, the plaintiff in the said suit and the Sheriff of Crittenden County, having the execution of the said order of sale, were enjoined from executing the said order or making the said sale, and the said injunction has always since continued in force and is yet in force, and the said matter is
65 being litigated between the parties in the said Circuit Court of the United States where the suit is still pending. To the record and proceedings in the said suit so remaining in the Crittenden Circuit Court reference is now here made for particularity and certainty, and the same is asked to be taken and considered as a part of this petition. Since the judgment and order of sale was so pronounced in the said Circuit Court of Crittenden County the said Mitchell has departed life, and C. W. Edmonds, named above, has been appointed and has become his successor as assignee of the Hill Shoe Company, and as such is entitled to the benefit of the said judgment and order of sale. By virtue of the said proceedings and the said facts said C. W. Edmonds as such assignee of the Hill Shoe Company has an existing claim and lien on the said above described lands.

(8.)

The title to the following of the above described tracts of land was vested, and circumstanced and situated and encumbered as has been hereinbefore stated, to wit, the W. ½ of the S. W. ¼ of Section 3, the W. ½ of the S. E. ¼ of Section 4, the W. ½ of Section 4, and Section 9, all in Township 3 North, Range 7 East on December 21st, 1897, when the suit was begun in this court styled the Board of Directors of the St. Francis Levee District *vs.* The Memphis Land and Timber Co. and others, being the same suit in the caption of this pleading mentioned. The parties named above and presenting this pleading were not made parties by name to the said suit and they have never heretofore appeared therein. They had no knowledge or notice of the commencement or the pendency of the said suit with respect to the said lands above described until after the proceedings hereinafter to be stated had been had. All the said parties during the said time except John Fritz, named above, were
66 and are yet not citizens of the State of Arkansas, and did not and do not reside therein, and reside outside its limits. The said John Fritz was during all the said time and yet is a citizen of Crittenden County residing therein.

(9.)

The said parties above named and each of them claim they were never legally or properly brought before the Court by any lawful warning order, or other publication, or by constructive service of process in the said suit, nor have they or either of them had such notice of the said suit, or the pendency thereof, as binds or concludes them, or either of them, by the proceedings and decrees therein, or any such notice as in any way affects or impairs their title to the tracts of land aforesaid, hereinbefore described, by the sale thereunder, and the proceedings with respect thereto, hereinafter to be stated.

(10.)

No sufficient affidavit of the plaintiff herein was filed in the Clerk's office of the said Court at or after the commencement of the said suit stating positively or sufficiently any one of the facts required by the statute Sandels & Hill's Digest, Section 5679, or any other statute, applicable in the premises, authorizing the Clerk of this Court to make any order upon the complaint herein, or otherwise, warning the said above named parties, or either of them, to appear in the said suit as required by law.

The Clerk of the said Court did not make upon the complaint in the said cause, or otherwise, any such order warning the said above named parties, or either of them to appear in the said suit, as required or obliged them to appear therein, or bound them by the proceedings which have been had therein. No such publication was ever made of any such warning order, made in the said suit, as required or obliged the said above named parties, or any or either of them, to appear in the said suit, or has had the effect of binding them by the proceedings which have been had therein. No such proof has been made in the said suit of the publication of any warning order therein, as has established the fact that any sufficient warning order has been properly and sufficiently published, or as conferred upon the said Court, or this Court jurisdiction of the said above named parties, personally, or any or either of them, with respect to the said tracts of land, before described, or either of them. The said above named parties each and all here positively deny that they or either of them, or the lands before described, or any part thereof, have ever been brought before the said Court, or this Court, or within its jurisdiction, or that it has ever had any power to decree the sale of the said lands, or any of them, or pass the title thereto.

67

(11.)

The said above named parties presenting this pleading were not, nor was either of them stated in the complaint in the above styled suit to be owners of the said tracts of land, or of any or either of them, nor were they or either of them stated to be the persons who claimed to be the owners of the said tracts of land. The evidence of the title of the said above named parties, and each of them, to the tracts of land, and each of them, appeared of record, as afore-

said, in the office of the Recorder of Crittenden County, and also of record in the said several suits in the said Circuit Court of Crittenden County, and in this Court as before stated herein.

The ownership of the said tracts of land, and each and every tract thereof, was therefore known to the plaintiff in the above styled suit, the Board of Directors of the St. Francis Levee District, and it has never been alleged in the said complaint in the said suit, or elsewhere in the said suit, that the ownership of the said tract of land was unknown to the plaintiff in the said suit, the Board of Directors of the St. Francis Levee District. And the said tracts of land have never been proceeded against in the said suit as being owned by unknown owners. And no notice has ever been given in the said suit by publication or otherwise as to the said tracts of land or either of them, to be unknown owners thereof. Nor has it ever been
68 alleged in any such notice nor in the complaint in the said suit, as before stated, nor in any other pleading in the said suit, that the owners of the said tracts of land, or either of them were unknown to the plaintiff in the said suit, the Board of Directors of the St. Francis Levee District. And no notice of the pendency of the suit as against non-residents of the County of Crittenden and unknown owners respectively with reference to the said tracts of land when the said suit was pending has ever been given by publication weekly for four weeks prior to the first day of a term of the said Court or prior to the day thereof on which the final judgment herein complained of for the sale of the said land was entered. And so the above named parties here presenting this pleading, and each of them, say that the judgment or decree hereinbefore stated and here complained of was rendered or pronounced without notice to the said above named parties or either of them actually or constructively, and that the same and the proceedings therein have always been and are absolutely null and void.

(12.)

The judgment or decree of this court in the said suit on February 16th, 1898, found and decreed that the W. ½ of the S. W. ¼ of Section 3, mentioned above, was indebted to the plaintiff in the said suit for certain Levee Taxes therein mentioned in the sum of $— as more fully appears by the said judgment or decree. It also found and adjudged that the W. ½ of the S. E. ¼ of Section 4, mentioned above, was indebted to the plaintiff in the said suit for certain levee taxes therein mentioned in the sum of $— as more fully appears by the said judgment or decree. It also found and adjudged that the W. ½ of Section 4 mentioned above was indebted to the plaintiff in the said suit for certain levee taxes for the years mentioned therein in the sum of $— as more fully appears by the said judgment or decree. It also found and adjudged that Section 9 mentioned
69 above was indebted to the plaintiff in the said suit for certain Levee taxes mentioned therein for the sum of $— as more fully appears by the said judgment or decree.

The parties above named claim and insist that the said judgment or decree and the sale thereunder, hereafter to be stated, were and are now void for the reason hereinbefore stated, and the reasons herein-

after to be stated. The said judgment or decree of February 16th, 1898, adjudged and decreed that the four tracts of land herein last described, to wit, the W. ½ of the S. W. ¼ of Section 3, the W. ½ of the S. E. ¼ of Section 4, the W. ½ of Section 4, Section 9, Township 3 North, Range 7 East, were indebted, in the manner before stated, to the plaintiff herein, the Board of Directors of the St. Francis Levee District, in the sums above stated, and that the same constituted a lien on the said tracts of land respectively, and that the Clerk of this Court, who was appointed Commissioner for the purpose, sell the said lands respectively, to the highest bidder for cash, having first advertised the said lands for sale in some newspaper for two weeks weekly, and that he execute a deed of conveyance to the purchaser thereof, and receive therefor a fee of $1.00. It is further decreed that there should be allowed the said Commissioner fees as follows; For furnishing the printer with a list of the lands to be advertised 5¢ per tract, for attending, reporting and making the sale 25¢ per tract. And that there should be allowed to the printer for publishing the said notices 50¢ per tract, which fees should be taxed as costs against the said several tracts of land, to be paid by the purchaser, or person discharging the lien before the sale. The parties hereto, named above, submit that the said provisions and requirements of the said decree were unauthorized and rendered the same void. The said judgment or decree then further required the Commissioner appointed to make the sale to report his proceedings thereunder to the Court at the next term.

(13.)

J. T. Haden the Clerk of the Court, appointed Commissioner as before stated, filed his report of the sale made by him under the said decree, on July 20th 1898, as more fully appears of record in Court here. In the said report he stated that he had sold the W. ½ of the S. W. ¼ of Section 3, 80 acres, for the sum of $5.80 to C. W. Hunter. That he had sold the W. ½ of the S. E. ¼ of Section 4, containing 80 acres, to the said C. W. Hunter for $5.80. That he had sold the W. ½ of Section 4, 320 acres, to the said C. W. Hunter for $200.50, and that he had sold all of section 9 for the sum of $360.00 to the said C. W. Hunter.

The said report of sale, as the parties hereto have been informed and believe and state, has been confirmed by decree of the Court, rendered at its last term, but for certainty they here refer to the record remaining in Court, as they have no knowledge on the subject. They state upon information and belief that the said J. T. Haden as such Commissioner has executed a deed or deeds to the said Hunter as the purchaser of the said tracts of land purporting to convey him the same under the sales and purchases. The said deed or deeds as the parties are informed and believe and state, are of record in the office of the Recorder of Crittenden County in Book — p. — to which they here refer as a part of this pleading. But upon information and belief they state and show that such deed or deeds have not yet been approved or confirmed by the Court here.

The said above named parties hereto claim and insist for the reasons before stated and the reasons hereinafter to be stated that the said purchases were and are absolutely void. They state further that they had no notice of the pendency of this suit, nor of the
71 said sales before stated, nor of the confirmation thereof until after the said confirmation had taken place, and was completed. They have therefore had no opportunity to appear in this suit, nor to object to the said report of sale since they received notice of the said suit until the present time which is their first opportunity. They bring into Court here and offer to pay the Court, or as the Court may order, such sums as are or may be required to redeem the said lands from the said sales and purchases, and pray the Court here to fix the amount to be brought in and paid.

(14.)

The said above named parties further state and show that the recitals in the decree or judgment of sale in the said suit of February 16th. 1898, before referred to that they or either of them by name or description or as unknown owners of the tracts of land before described or any or either of them or any tract of land proceeded against in this suit had been severally constructively summoned to appear in the said suit by publication in a newspaper publis-ed in Crittenden County, Arkansas, weekly for four weeks before the said judgment or decree or that proof of such fact had been previously filed in the said suit, or this suit, was and is entirely untrue. The said parties deny the said allegations or statement. They here take issue thereon and ask leave of the Court to contest the truth thereof, and to produce evidence and make proof on the subject to the contrary.

And the said parties further state and show that nothing in the complaint in the said suit or the complaint herein when taken as confessed as the judgment or decree recites it was, authorized or justified the said decree of sale against the said above named parties or either of them or against or with respect to the said tracts of land or either of them.

No testimony was introduced in the said suit as to the liability of the said above named parties or either of them, or of the said tracts of land or either of them for the said sums so adjudged
72 or decreed against them respectively as before stated. And the said Circuit Court and this Court were not authorized to award or decree *pro confesso* against the said above-named parties or either of them or as to the said tracts of land or either of them in favor of the plaintiff here, the Board of Directors of the St. Francis Levee District, for the amounts of the taxes, interest, penalties and cost claimed to be due and found and decreed to be due therefrom, or thereon, as more fully appears by the said judgment or decree which is now here again referred to.

And for the reasons before started and reasons herein stated and reasons hereinafter to be stated the above named parties insist that the said judgment or decree as to them and each of them and the said above mentioned tracts of land and each of them is without authority and absolutely void.

(15.)

And the said above named parties particularly attack and deny the validity of the following named provisions of the statute on which the said suit herein is based, and on which the judgment and decree aforesaid and the sale hereunder, are rested, to wit:— Those provisions of Act No. 71 of the Acts of the General Asembly of the year 1895, approved on April 2nd., 1895, which declare: That notice of the pendency of such suit shall be given as against nonresidents of the County and unknown owners respectively, when such suits may be pending, by the publication weekly for four weeks prior to the day of the term of the Court on which judgment may be entered for the sale of the said land in some newspaper published in the county where such suit may be pending, and then gives the form of the notice, and then provides that there shall follow in the notice a list of the supposed owners, with a descriptive list of the delinquent lands, and the amounts due thereon respectively, and the conclusion to such notice.

And those declaring: that as against any defendant who resides in the county where such suit may be brought, and who appears by the record of deeds in said County to be the owner of any lands pro-
73 ceeded against, notice of the pending suit shall be given by the service of personal summons of the Court, at least twenty days before the day on which the said defendant is required to answer as set out in the summons, and that actual service of summons shall be had where the defendant is in the County, or where there is an occupant upon the land. And that the said suit shall stand for trial at the first term of the Court after complaint may be filed, if such four weeks in the case of a non-resident or unknown owner as aforesaid of the said twenty days in the case of a resident defendant as aforesaid shall expire, either before the first day of the term of the Court in which said suits are brought respectively, unless a continuance is granted for good cause shown, within the discretion of the Court. And that in all cases where notice has been filed or if filed and the cause decided for the plaintiff, the Court by its decree shall grant the relief as prayed in the complaint, and shall direct the said commissioner to sell the land as described in the decree at the Court House door of the County wherein the decree is entered at public out cry to the highest bidder for cash in hand, after first having advertised such sale weekly for two weeks consecutively in some newspaper published in the County, or otherwise, as prescribed. And that the said Commissioner shall by proper deeds convey to the purchasers the lands so sold and that the title to the said lands shall thereupon become vested in such purchaser as against all others whomsoever saving to infants and insane persons the rights given them by Section 12 of the Act of February 15th. 1893

And that said suit shall be conducted in accordance with the practice and proceedings of Chancery Courts in this State, except as in the Act, is otherwise provided: Except that neither attorneys nor guardians *ad litem*, nor any provision of Section 5877 of Sandels & Hill's Digest of the statutes of Arkansas shall be required, and

except that said suits may be disposed of on oral testimony as
74 in ordinary suits at law. And that this law shall be liberally construed to give said assessment lists the effect of *bona fide* mortgages for a valuable consideration, and a first lien upon the said land as against all persons having an interest therein. And that no informality or irregularity in holding the meetings, or in the description or valuation of the lands or in the names of the owners or the number of therein shall be a valid defense to such action.

So far as the said provisions affect the rights of the said above named parties or either of them to the said tracts of land aforesaid and each of them or their rights in this suit the validity of the same is denied. It is claimed that they and each of them are unconstitutional and void so far as they effect or impair such rights. And it is also claimed that the acts done under them respectively are void.

The said provisions of the said act, and the said proceedings thereunder violate Section 8, Article 2 of the Constitution of the State of Arkansas, providing that no persons shall be deprived of life or liberty or property without due process of law. They also violate that provision of Section 18, Article 2, which provides that the General Assembly shall not grant to any citizen or class of citizens privileges and immunities which upon the same terms shall not equally belong to all other citizens.

They also violate that provision of Section 21, Article 2 of the said Constitution which provides that no person shall be desoized of his estate, freehold, liberties, or privileges, or in any manner deprived of his property, except by the judgment of his peers or the laws of the land.

They also violate that provision of Section 25, Article 5 of the said Constitution which provides that in all cases where a general law can be made applicable no special law shall be enacted, nor shall a portion of any general law be suspended by the Legislature
75 for the benefit of any particular individual, corporation or Association, nor where the Courts have jurisdiction to grant the powers or the privileges, or the relief asked for.

They also violate Clause 1, Section 2, Article 4, of the Constitution of the United States, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several states.

They also violate that privilege of the 14th Amendment to the Constitution of the United States which declares that no State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

For the reason that the said legislation and the said portions of the said judgment or decree of the said Circuit Court and this Court, and the proceedings thereunder hereinbefore stated, including the sales of the said tracts of land are in conflict with the State Constitution and the Constitution of the United States in the particulars stated, and are therefore void, and said above named parties and each

of them claim and insist that the said judgment or decree and the sales made thereunder, and the report of sale, and the confirmation thereof, and any and all deeds which have been made by the Commissioner under and in pursuance thereof are null and void, and should be set aside.

(16.)

The above named parties further state and show that about May 17th., 1899, the plaintiff the Board of Directors of the St. Francis Levee District by a deed to be found of record in the office of the recorder of Crittenden County in Book L, Vol. 2 p. 315, through Jno. B. Driver its President undertook to convey to the said above named C. W. Hunter the following described of the tracts of land hereinbefore described, to wit:—the N. W. ¼ of Section 10,
76 the W. ½ of Section 4, the W. ½ of the N. E. ¼ of Section 4, the W. ½ of the S. W. ¼ of Section 3, and an undivided ½ of all section 9, all in Township 3 North, Range 7 East. A copy of the deed will be produced on the hearing, if required as a part hereof. But the said C. W. Hunter is hereby given notice and required to produce the original.

As the parties here are informed and believe and state the said deed was made upon the assumption and claim that all the said tracts of land belonged to the plaintiff here, the Board of Directors of the St. Francis Levee District, under a forfeiture thereof for the nonpayment of the taxes for the year 1893. The said deed claims and asserts that all the said lands were forfeited to the State for that year, and that the same had become the property of the plaintiff here the Board of Directors of the St. Francis Levee District by virtue of such forfeiture and the grant by the State through the several acts of the General Assembly on the subject of the said lands to the said plaintiff the Board of Directors of the St. Francis Levee District. The parties hereto claim and insist that the said deed is absolutely void and that the same conveyed no title whatever to the said C. W. Hunter.

(17.)

The Sale for the Taxes for 1893 Invalid.

The said above named parties say it is true that the said tracts of land just described were assessed for taxation for State and County purposes by the Assessor of Crittenden County for the year 1893, and taxes were levied thereon, and such taxes were not paid by the owners of the said land, and the said tracts of land were returned delinquent by the collector and the Clerk of the Circuit Court caused the said tracts of land to be advertised for sale for the nonpayment of taxes due thereon, and the Collector at the sale bid in the said tracts of land for the State of Arkansas for the said taxes for the year 1893.
77 But the said sale for the said taxes of the said tracts of land respectively were absolutely void, because no notice was attached to the delinquent list of real estate for the year 1893, as required by section 6606 of Sandels & Hill's Digest of the Statutes, and the Clerk of the County Court did not make the certificate at the foot

of the record of the said delinquent list required by the said section of the said Statute. Wherefore, the State acquired no title to the said several tracts of land by its said purchase at the said sale.

It is also true that the General Assembly of the State of Arkansas by the several acts on the subject donated all the lands described as lands belonging to the State within the limits of the St. Francis Levee District to the plaintiff here the Board of Directors of the St. Francis Levee District, or to the said Levee District, but the several tracts of land hereinbefore described and so forfeited to the State of Arkansas at the said sale for the year 1893 and so conveyed as before stated by the Board of Directors of the St. Francis Levee District to the said Hunter were not lands embraced within any of the Acts of the General Assembly, such lands not belonging to the State of Arkansas, and it having no title thereto, and heretofore the parties aforesaid deny that the said Hunter under his said purchase, and the said deed, has ever acquired any title to the said tracts of land or either of them. They claim and insist as aforesaid that the State never had any title to the said tracts of land and that it had not granted any title to the Board of Directors of the St. Francis Levee District, and that the Board of Directors of the St. Francis Levee District could not convey any title to the said Hunter.

78 (19.)

Estoppel by the Sale for Levee Taxes for the Years 1893 and 1894 Respectively.

The parties aforesaid further state and show that the Board of Directors of the St. Francis Levee District, the plaintiff in the suit aforesaid, caused the said tracts of land, to wit, the N. W. 1/4 of Section 10, the W. 1/2 of Section 4, the W. 1/2 of the N. E. 1/4 of Section 4, the W. 1/2 of the S. W. 1/4 of Section 3, and all of section 9, in Township 3 North, Range 7 East to be listed and assessed for taxation for levee taxes in the said County of Crittenden, for each the years 1893 and 1894, as the property of the former owners thereof, and as subject to the payment of such taxes for the said years The said taxes as so assessed and levied for the said years respectively were not paid by the said former owners, and on the — day of 189-, the plaintiff here the Board of Directors of the St. Francis Levee District instituted in the Circuit Court of Crittenden County its suit styled the Board of Directors of the St. Francis Levee District *vs.* W. H. Echols and others, to the record of which said suit reference is now here made. The said suit was brought among other things for the purpose of enforcing the collection of the said levee taxes so assessed and levied upon the above mentioned lands for the said years 1893 and 1894 respectively.

Such proceedings were had in the said suit that a decree was pronounced therein in the said Circuit Court of Crittenden County fixing the amount of the said Levee taxes so due upon the said tracts of land respectively for each of the said years and decreeing the payment of the same. A time was given by the said decree within which to pay such levee taxes, and in default of such payment a Commis-

sioner was thereby appointed to make sales of the said tracts of land respectively after notice and upon terms prescribed in the said decree.

79 The said Levee taxes so decreed to be paid were not paid according to the said decree, and the Commissioner appointed thereby to make sale of the said tracts of land, after having advertised the same as required by the said decree, on July 21st, 1896, sold each and all the said tracts of land at public auction to the highest bidder for cash. And at such sale John Johnson became the purchaser of each and all the said tracts of land for sums of money more than sufficient to pay and discharge all the levee taxes assessed and due thereon. The said Johnson at the said sale complied with the terms thereof and paid the sums bid by him in order to make purchases of the said tracts of land, and the same were received by the Commissioner making the sales, and afterwards paid over to the plaintiff herein, the Board of Directors of the St. Francis Levee District, in discharge of the said Levee taxes so assessed and levied, and decreed to be due on the said several tracts of land for the said years 1893 and 1894 respectively.

Afterwards, and in the course of the said suit of the Board of Directors of the St. Francis Levee District *vs.* W. H. Echols and others, John B. Leech one of the parties hereinbefore named, redeemed the said tracts of land and each of them from said purchases thereof so made by the said John Johnson, and the said John Johnson received the money tendered him in redemption of the said lands so purchased by him at the said sales, and released his claim of title under said purchases respectively, and the said Crittenden Circuit Court by a judgment or decree afterwards pronounced in the said suit ratified and approved and confirmed such redemption, and gave effect thereto. Whereby as the parties aforesaid now claim and insist and state and show the plaintiff here the Board of Directors of the St. Francis Levee District by virtue and in consequence of the assessment and levy of the said Levee taxes for the years 1893 and 1894 respectively on the said tracts of land, and the bringing of the said suit to recover the said taxes, and the judgment and de-

80 cree therein for the recovery of the same and the sale of the said lands for the payment thereof, and the sale of the said lands under the said judgment or decree, and the purchase thereof by the said John Johnson, and the receipts of the amounts due for the levee taxes for the said years 1893 and 1894, out of the purchase money paid in by the said John Johnson, was estopped, before the making of the said deed to the said Hunter, professing and purporting to convey to him the said tracts of land, from setting up or asserting any claim of title to the said tracts of land, or either of them, under the grant to it, the plaintiff here, the Board of Directors of the St. Francis Levee District, by the State of Arkansas, or under forfeiture to, or purchase by the State of Arkansas of the said tracts of land for the taxes for the year 1893 aforesaid, or under any other purchase or sale, or by reason of any other fact, or state of facts.

And the said parties claim and insist that the said estoppel operates upon and against the said C. W. Hunter as completely and effectually

as against the plaintiff here, the Board of Directors of the St. Francis Levee District, and that in consequence thereof the said Hunter has acquired no title by virtue of the said deed, or the conveyance therein, or thereby, to the said tracts of land or either of them, and that his pretended purchase and the said deed and conveyance are void.

(19.)

The said C. W. Hunter named above, the purchaser as before alleged of the said tract of land herein described, is a non-resident of the State of Arkansas and resides in the State of Tennessee.

He is not in the actual possession or occupation of any or either of the said above described tracts of land.

Prayer.

In consideration of the premises, the above named parties pray that the foregoing may be taken and considered and have the
81 effect of their answer to the original bill of complaint herein, and of their motion based thereon, as provided by the Statute, Sandels & Hills' Digest of the Statutes of the State of Arkansas, Section 5882. They also pray that if the same is necessary to their relief the foregoing pleading be taken and considered as their petition, under Sections 5839-5843 of Sandels & Hill's Digest. They pray also that if necessary to their relief the said pleading may be taken and considered as an original complaint, and ordered to be filed and to stand and proceed as such under Sections 4197-4199 of Sandels & Hill's Digest, and under Sections 6120-6124 of the same, and the amendments thereto.

They pray also that if necessary to their relief the said pleading may be taken and considered as a bill of review of the decrees and proceedings in the above styled suit of the Board of Directors of the St. Francis Levee District *vs.* the Memphis Land & Timber Co. and others, Equity docket #589.

They further pray that all the parties to the said suit in which the said judgment or decree has been rendered, and in which the said proceedings thereunder have been so had, including the plaintiff, the Board of Directors of the St. Francis Levee District, and the said C. W. Hunter, the purchaser of the said above described tracts of land, as before stated, may be considered and treated as defendants to this petition, motion and complaint, and as before the Court for all the purposes of the relief herein prayed. Or if necessary they pray that the said C. W. Hunter, the purchaser of the said tracts of land as aforesaid, may be brought before the Court here by the proper service of summons on him personally, or by the proper publication of the necessary warning order in such cases, and made a defendant thereto. That on the final hearing the decree of sale entered in the said above suit above described on the 16th day of February, 1898, and all the subsequent decrees therein affecting the above named parties personally, or the said tracts of land, or

either of them or their interests therein may be reviewed,
82 reversed, vacated, set aside and held for naught.

That the decree hereinbefore stated, entered in the said suit confirming the sale of the said several above mentioned tracts of land to the said C. W. Hunter may be vacated, set aside and held for naught, and that the report of sale, as to the said tracts of land sold to the said Hunter, be set aside, vacated and cancelled, and the sales of the same to the said Hunter be vacated, set aside and held for naught.

That the deeds which have been made as aforesaid by the Commissioner making the sales to the said Hunter, or any one claiming under or through him by assignment, or otherwise, may be cancelled, vacated and held for naught. That the deed mentioned above, made by the Board of Directors of the St. Francis Levee District, through John B. Driver its president, to the said C. W. Hunter conveying or purpo-ting to convey the said above mentioned tracts of land may be cancelled, set aside and held for naught.

That the titles of the parties above named, to the tracts of land before described, may be cleared and quieted and confirmed and declared to be complete and perfect, according to the respective rights of the said parties therein, as the same may be finally determined as between them, as against the proceedings in the said suit, and the said C. W. Hunter, and all the parties thereto. That the parties hereto, above named, may be permitted to pay the taxes justly and legally due to the plaintiff, the Board of Directors of the St. Francis Levee District, on the said tracts of land, including all penalties, interests and costs properly chargeable thereon, and they here bring into Court and offer to deposit or pay, according to the Court's direction, the sum or sums of money requisite for the said purpose. Or if proper, and according to the practice of the Court, and to law, they pray that they may be allowed to redeem the said tracts of land from the said C. W. Hunter by paying him the sums of money to which he is entitled in order to effect such re-
83 demption, and they here offer to bring into Court and offer to pay or deposit, according to the Court's direction, the sum or sums of money necessary to effect such redemption. Or if more appropriate, and according to the law in such cases, the said parties pray that they may be allowed to increase the bids of the said Hunter for the tracts of land bought by him at the sale made to him by the Commissioner as before stated, and they hereby offer to increase such bids of the said Hunter for each of the said tracts of land by the amount of 50% thereof upon each bid respectively, and they here bring into Court and here offer to deposit or pay, according to its direction, the sum or sums of money necessary to make good their respective bids for the said tracts of land as so increased.

And they also pray the proper judgment against the said Hunter and the other adverse parties for costs herein. And they pray for all other just, proper, and necessary relief.

(Signed) RANDOLPH & RANDOLPH,
F. H. HEISKELL,
SMITH & TREZEVANT,
Attorneys for Above Parties.

STATE OF TENNESSEE, *County of Shelby:*

I, John Fritz, named in the foregoing answer, petition and complaint do solemnly swear that the facts therein set forth are true to the best of my knowledge, information and belief.

(Signed) JOHN FRITZ,
Clerk of Circuit Court.

Subscribed and sworn to before me in and for the said County and State on this 25th day of September, 1899.

(Signed) J. T. HADEN, *Clerk,*
By R. F. WARD, *D. C.*

84 Endorsement & File Mark: Equity Docket # 585. Board of Directors of St. Francis Levee District *vs.* Memphis Land and Timber Co. *et al.* Answer, Motion, petition and bill of review of Richard H. Allen and others. Filed September 25th, 1899. J. T. Haden, Clerk, By R. F. Ward, D. C. Randolph & Randolph.

85 *Agreement of Counsel.*

Crittenden County Chancery Court Record "H."

September Term, 1900, Page 136.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND AND TIMBER CO. ET ALS.

On this day an agreed statement of facts is filed herein.

Crittenden County Chancery Court Record "H."

September Term, 1900, Page 138.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND AND TIMBER CO. ET ALS.

It is agreed that without any plea by C. W. Hunter to the answer motion, petition or bill of review, or original complaint of Richard H. Allen *et als.* in the above entitled cause that the matter there presented shall be heard as an agreed case upon the agreed statement of facts heretofore filed in this cause and the evidence therein referred to.

RANDOLPH & RANDOLPH,
For RICHARD H. ALLEN ET ALS.
L. P. BERRY,
For C. W. HUNTER.

It is ordered that the above agreement be put of record.

86 *Agreement of Counsel.*

589, Crittenden Chy.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT, Plaintiff,
vs.
MEMPHIS LAND & TIMBER COMPANY ET ALS., Defendants.

It is agreed that without any plea by C. W. Hunter to the answer, motion, petition of bill of review or original complaint of Richard H. Allen *et al.* in the above entitled cause that the matters there presented shall be heard as an agreed case, upon the agreed statement of facts heretofore filed in this cause and the evidence therein referred to.

(Signed) RANDOLPH & RANDOLPH,
For RICHARD H. ALLEN ET AL.
L. P. BERRY,
For C. W. HUNTER.

It is ordered that the above agreement be put of record.

87 *Agreed Statements of Facts.*

In the Chancery Court of Crittenden County, Arkansas.

Equity Docket, # 589.

BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT,
Plaintiffs,
vs.
MEMPHIS LAND & TIMBER COMPANY and Others, Defendants.

For the Collection of Levee Taxes for the Year 1897.

In the matter of the controversy between Richard H. Allen, Harry Allen, Mary L. Latham and John C. Latham, her husband, Ellen H. Allen, Thos. H. Allen, Jr., Floy G. Allen, John C. Latham in his own right, Jno. B. Leech, John Fritz, The Phœnix Fire & Marine Insurance Company, the Memphis Savings Bank, the City National Bank of Cairo, Ill. and C. W. Edmunds, as assignee of the Hill Shoe Co. on the one side, and C. W. Hunter, on the other, arising upon the answer, motion, original complaint and bill of review of the said Richard H. Allen and others, and the answer and reply thereto of the said C. W. Hunter. For the purposes of the trial of the issues between the said parties presented as above, the following state of facts is hereby agreed on, and this agreement is to have the effect of proof duly made upon the said issues and is to be the basis for the decision of the controversy between the said parties.

(1.)

Nothing contained in this agreement shall be taken as agreed to, except for the purposes of the litigation in this suit. None of the parties are to be bound by any statements or admissions of fact herein made, in any other proceeding, or for the purpose of any other suit, either pending or hereafter to be brought. This agreement is not to be used in evidence in any case but this, nor are any facts herein agreed to be used in evidence as agreed facts in any other suit
88 or proceeding against or in favor of any of the parties hereto.

(2.)

It is agreed that on the 27th day of March 1889, Thos. H. Allen was the owner of the following described property situated in Crittenden County, Arkansas, to wit:—The South ½ of Section 10, the Northwest ¼ of Section 10, all of section 9, the West ½ of Sec. 4, the Southeast ¼ of Section 4, the West ½ of the N. E. ¼ of Section 4, and the West ½ of the S. W. ¼ of Section 3, all in Township 3, North Range 7 East, and that his title papers were of record in the office of the Recorder of Crittenden County, Ark.

(3.)

It is further agreed that on the 27th day of March, 1889, Thos. H. Allen by a title bond of that date, afterwards acknowledged and in February 1893 put of record in the office of the Recorder of Crittenden County, Arkansas, Book "G" Vol. 2, Page 109, bargained and sold the said lands and other lands to the defendant John Fritz, as more fully appears by the said title bond.

The said title bond or a true copy thereof is made a part of this agreement for all the purposes thereof, and of the controversy herein, and may be used in evidence, by any of the parties. When the said title bond was made the said Allen as the owner was in possession of the said lands and there was no adverse possessions against him thereof. At that time John Fritz was a resident and citizen of Crittenden County, Arkansas, and has continued to be ever since. He has lived on lands adjoining those above described.

When the said Allen made the said John Fritz the said title bond, he authorized him to take possession of the said lands and to control the same, and the said John Fritz assumed under the said title bond such possession and control. There had been no possession of the said lands adverse to the said John Fritz prior to the 1st day of
89 January 1898, and he was not made a party to this suit nor served with process herein. That there has been at no time an actual occupancy of these lands, except the South half of Section 10 (ten) and the S. E. quarter of Section 4, which Margaret Fritz occupied.

(4.)

It is further agreed that Thos. H. Allen died intestate a resident and citizen of the state of Tennessee, on the 22nd day of October, 1895, and that he left surviving him as his heirs at law Richard H.

Allen, Thos. H. Allen, Jr., both citizens of the State of Tennessee, Harry Allen, a citizen of the State of Louisiana, Mary L. Latham, wife of J. C. Latham, a resident and citizen of the State of New York, and Mrs. Ellen Allen, his widow, a resident and citizen of the State of Tennessee.

It is further agreed that since the death of the said Thos. H. Allen, the said Thos. H. Allen Jr., has departed life, and that he left as his heirs at law his son Richard H. Allen, Jr., and also left his widow, Floy G. Allen, both residents and citizens of the State of Tennessee. The said Richard H. Allen, Jr., is a minor, under the age of 21 years. The other parties are all adults.

(5.)

The record and proceedings in the suit in this Court styled Jno. B. Leech plaintiff *vs.* John Fritz and others defendants, may be used as evidence on hearing of this cause by any of the parties without filing copies of such record, or giving further notice thereof, subject only to objections for irrelevancy and incompetency.

This agreement includes the cross complaint of John C. Latham in the said suit and the answer and pleadings and proceedings with respect thereto, subject to the same reservation. And the notes described in the said complaint and cross complaint may also be used as evidence in this suit for all proper purposes subject to objections for irrelevancy and incompetency, as stated above.

90 (6.)

The record and proceedings in the suit in the Circuit Court of Crittenden County, brought on the 30th. day of June 1892, yet pending there, styled Phœnix Fire & Marine Insurance Co., *vs.* Thos. H. Allen and others, may be used as evidence in this suit, for all the proper purposes thereof, including the pleadings, proceedings, process, returns, orders and judgments, subject to objections for incompetency and irrelevancy, without further notice, and without filing copies of such record in this suit.

(7.)

The record and proceedings in the suit in the Circuit Court of Crittenden County, brought on the 30th. day of June 1892, and yet pending, styled the Memphis Savings Bank *vs.* Thos. H. Allen and others, may be used as evidence in this suit for all proper purposes thereof including the pleadings, proceedings, process, returns, orders and judgments, subject to the objections for incompetency and irrelevancy, without further notice, and without filing copies of such records in this suit.

(8.)

The records and proceedings in the suit in the Circuit Court of Crittenden County brought on the 6th. day of August, 1892, and yet pending there styled City National Bank of Cairo, Ill., *vs.* Thos. H. Allen and others, may be used as eveidence in this suit for all the

proper purposes thereof, including the pleadings, proceedings, process, returns, orders and judgments, subject to objections for incompetency and irrelevancy without further notice and without filing copies of such record in this suit.

(9.)

The record and proceedings in the suit in the Circuit Court of Crittenden County brought on the 6th. day of August, 1892, and yet pending there, styled A. G. Mitchell as assignee of the Hill Shoe Company, a corporation of the State of Tennessee, *vs.*
91 Thos. H. Allen and others, may be used as evidence in this suit, for all the proper purposes thereof, including the pleadings, proceedings, returns, process, orders and judgments, subject to objections for incompetency and irrelevancy, without further notice, and without filing copies of such record in this suit.

It is further agreed that C. W. Edmunds, has been substituted as assignee in the place of Albert G. Mitchell as plaintiff in the said suit, and is entitled to all the rights of the said Albert G. Mitchell as plaintiff therein.

(10.)

It is further agreed that on the 1st. day of January 1897, and always since that time the parties named above as the heirs at law of Thos. H. Allen, and the plaintiffs in all the suits described above in this Agreement, and all of the parties interested in the said lands before described, except John Fritz, resided outside of the State of Arkansas, and have continued to reside outside thereof ever since, and none of them have been or are citizens of the State of Arkansas, except the said John Fritz.

It is further agreed that none of the said persons just referred to in this paragraph of this agreement were made parties to this suit, which was begun by the filing of the complaint on the 21st day of December, 1897.

It is further agreed that each of them, except the said John Fritz, would testify that they had no knowledge of the present suit against the lands described above, or its pendency, or that taxes for levee purposes had been levied by the Board of Directors of the St. Francis Levee District upon the said lands, prior to the date of the sale of the said lands in this suit, and the purchase thereof by the said C. W. Hunter, or that any law on that subject had been enacted.

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(11.)

It is further agreed that the record of this suit including the original complaint and any and all amendments thereto that may have been made, and the warning order, or order of publication and the proof of the publication thereof, any summons and other process that may have been issued in the course of the suit, and the returns of the Sheriff, or other officer, on all process, and the publication of the warning order, or notice made in the Marion Reform, a newspaper published in Crittenden County, and the

pleadings and proceedings in this suit, including all the orders, judgments and decrees on the Minute Book of the Court, and any and all reports of sales, made by the Commissioner, having reference to the lands described above, may be used and read in evidence on the hearing, by either of the parties to this controversy for all proper purposes thereof, subject only to objections for irrelevancy and incompetency, all other objections being waived. And if the original record, process, pleadings, proof, or proceedings, or other paper of record cannot be found, then a true or duly certified copy thereof may be produced and used as evidence in the place of the originals and with a like effect.

(12.)

It is further agreed that the blanks in the answer, motion, etc., of the Defendants Richard H. Allen and others, in Par. 12, thereof, Page 13-14, may be filed at or before the hearing of this cause from the judgment or decree of record, therein referred to, with the like effect, as if such blanks had been filled upon the filing of the said paper.

93

(13.)

It is further agreed that the Clerk of this Court was allowed a fee of $1.00 for making the deed to the said C. W. Hunter, conveying the lands conveyed him under the purchase made, as stated above, from the said J. T. Haden as Commissioner. Also that the Clerk was allowed for furnishing the printer with a list of the said lands to be advertised 5 cents for each tract. And, further, that the Clerk was allowed for advertising and making a report of the sale the sum of 25 cents for each tract of the said land. And that the printer for printing and publishing the notices of the suit as to, and of the sales of the said lands was allowed the sum of 50 cents for each tract of the said lands.

It is further agreed that the said sums were taxed as costs against the said lands described above, and sold to the said Hunter, and were paid out of the proceeds of the sale thereof, by J. T. Haden, the Commissioner, as Clerk, after the sales had been completed by the purchasers.

(14.)

It is further agreed that any deed made by the said J. T. Haden, as Commissioner, to the said C. W. Hunter, under the purchase and sales aforesaid, or a duly certified copy thereof, or the record of such deed in the Recorder's office, may be used and read in evidence by either of the parties for the purposes of this suit, subject to objections for irrelevancy and incompetency. And if the said deed has been confirmed or approved by the Court, the order approving or confirming the same may in like manner be used or read in evidence.

(15.)

It is further agreed that the deed dated the 17th. day of May, 1899, and of record in the office of the Recorder of Crittenden

County, Book L, Vol 2 p. 315, made by the Board of Directors of the St. Francis Levee District to C. W. Hunter, purporting to convey the N. W. ¼ of Section 10 and other lands, as therein
94 described in Township 3 North, Range 7 East, or a true and duly certified copy thereof, or the record thereof in the Recorder's office, may be used and read in evidence by either of the parties to this suit, subject to objections for irrelevancy and incompetency.

(16.)

It is further agreed that the entire record of the tax sales, including the reports or returns of the tax collector, and the record made by the clerk of the County Court of Crittenden County, showing such report, and also showing the sales of property for taxes, and the forfeiture of property for taxes, in the office of the Clerk of the County Court of Crittenden County, and all notices as to taxes for the year 1893, and all certificates attached to the said reports, or records, or returns, or notices, so far as the same concern the land described in the deed, referred to in the next preceding paragraph of this agreement, may be used and read in evidence by either of the parties to this suit, subject to objections for irrelevancy and incompetency.

(17.)

It is further agreed that the record of the suit in the Circuit Court of Crittenden County, styled the Board of Directors of the St. Francis Levee District *vs.* W. H. Echols *et als.*, brought to collect the levee taxes for the years 1893 and 1894, so far as the same has reference to the above described lands, and particularly the following of them, to wit: The N. W. ¼ of Section 10; the West ½ of Section 4; the West ½ of the Northeast ¼ of Section 4; and the west ½ of the Northwest ¼ of Section 3, and all of Section 9, in township 3 North, Range 7 East, including the original complaint and the exhibits and the other pleadings, and the writs of summons and warning order therein, and the returns thereon, and proof of the publication thereof, and the judgment pronounced, and the reports of the sales made by the Commissioner, and all the decrees and proceedings in
95 the suit, including any deed or deeds made by the Commissioner, and the confirmation or approval thereof, may be used and read in evidence by any or either of the parties for the purposes of this suit, subject to objections for irrelevancy and incompetency only, all other matters being waived.

(18.)

It is further agreed that the deed made to John Johnson as purchaser, by J. T. Haden as Commissioner, under the sale in the suit described in the last preceding paragraph of this agreement, of the lands therein described, may likewise be used and read in evidence in this suit for all the purposes thereof, subject to objections for irrelevancy and incompetency. If the said deed cannot be produced, a true copy thereof or the record thereof in the Recorder's Office may

in like manner be used and read in evidence in this suit, instead of the original and with like effect. And the record showing the redemption of the said lands from the said sale to the said John Johnson by Jno. B. Leech, appearing in the said suit, mentioned in the next preceding paragraph, may likewise be used and read in evidence in the same manner, as stated above, for the purposes of this suit.

(19.)

It is further agreed that the said C. W. Hunter is a nonresident of the State of Arkansas, and resides in the State of Tennessee, and has never resided in the State of Arkansas, and that he is not in the actual occupation of any of the lands above described. That since the sale of these lands to C. W. Hunter in — 1898, up to the time when the motion, answer or petition of Richard Allen *et al.* was filed, in September 1899, said lands advanced one hundred per cent. in market value.

(20.)

And it is further agreed that the said Richard H. Allen, and others acting with him herein, have tendered and offered to pay the said C. W. Hunter the sums necessary to redeem the lands aforesaid
96 purchased by him from his purchases at the tax sales made to him, as stated above, and that they now stand ready to make such payment, and that the said C. W. Hunter has refused to receive such tender, and denies the right of redemption claimed, and insists that the said lands belong to him as owner under his said purchases.

Done this 17th. day of September, 1900.

(Signed) RANDOLPH & RANDOLPH,
For RICHARD H. ALLEN,
JOHN FRITZ AND OTHERS.

(Signed) L. P. BERRY,
For C. W. HUNTER.

97 Endorsement and file mark. Equity Docket # 589 Board of Directors of the St. Francis Levee District, *vs.* The Memphis Land and Timber Co. *et als.* Agreed State of Facts. Controversy between the heirs at law of Thos. H. Allen, Dec'd, John Fritz, Jno. C. Latham, Jno. B. Leech, P. F. & M. Ins. Co. *et als.*, on the one side, and C. W. Hunter on the other. Filed Sept. 25th. 1900 J. T. Haden, Clerk By R. F. Ward, D. C. Randolph & Randolph.

98

Deed to Hunter.

This indenture, made this 16th. of January, 1899, by and from J. T. Haden, as Commissioner in Chancery, party of the first part hereto, and C. W. Hunter, party of the second part hereto, Witnesseth:

Whereas, at a term of the Chancery Court begun and held in and for the County of Crittenden, and the State of Arkansas, on January

17th. 1898, it was by said Court on the 14th. day of Feb. 1898, a day of said term, among other things, ordered, adjudged and decreed in a certain cause then pending therein, between the Board of Directors of the St. Francis Levee District, as complainant and the Memphis Land and Timber Co., *et al.*, were defendants that one (he being one of said defendants in said cause) pay to the Board of Directors of the St. Francis Levee District, complainant in said cause, the sum of money set opposite the names and tracts, as taxes, interest, penalty and costs, due to said Board of Directors of the St. Francis Levee District, from said defendant for the years 1895, 1896, 1897, on the following lands, lying, situate and being within the limits of the St. Francis Levee District, in said Crittenden County, to wit: E. ½ N. E. ¼ and N. W. & E. ¼, Section 3, T. 3 N. R. 7 E.; W. ½ S. W. ¼ Section 3, T. 3 N. R. 7 E.; W. ½ Sec. 4 T. 3, N. R. 7 E.; W. ½ S. E. ¼ Sec. 4 T. 3 N. R. 7 E.; all Sec. 9, T. 3 N. R. 7 E..; W. ½ and S. E. ¼ Section 32 T. 4. N. R. 7 E.; W. ½ N. E. ¼ Sec. 32 T. 4 N. R. 7 E. Total $672.95. which sum of money was adjudged by said decree to be a first lien on said described real estate as against all persons having an interest therein, and that, in default of such payment, said described land be sold by the said party of the first part (who was thereby appointed Commissioner of said Court for that purpose) at public outcry, to the highest bidder, for cash in hand, at the front door of the Court House of Crittenden County, within legal hours, June 13, 1898, after giving notice of the time, terms and place of sale, by publishing such notice in some newspaper of general circulation published in said Crittenden County, weekly, consecutively for two weeks; and if all of said lands were not sold on this said day, the sale to be continued from day to day until completed; and whereas, the said sum of money, penalty, interest and costs as aforesaid, being and remaining wholly unpaid, said party of the first part, as such Commissioner, in pursuance of the order and directions contained in said decree, gave notice of the time, place and terms of sale of said lands, by publication thereof in the Marion Reform, a weekly newspaper of General and *bona fide* circulation, published in said Crittenden County for two weekly insertions consecutively, and did proceed on said day as advertised, between nine o'clock, A. M. and three o'clock P. M. and offered said lands for sale at public outcry, to the highest bidder, at the front door of the Court House of said Crittenden County, and at such sale so made and had the said party of the second part bid and offer- for said lands the sum of $672.95, and he being the highest and last bidder, the same was then and there publicly struck off and sold to C. W. Hunter for that sum; and whereas, the said sale was duly recorded at the July 1898 term of said Court, and duly approved, and the undersigned Commissioner directed to make a deed to the purchaser.

Now therefore, This indenture witnesseth, that the said J. T. Haden, as Commissioner in Chancery aforesaid, and party of the first part to these presents, in order to carry into effect the sale made as aforesaid, in pursuance of the decree of said Chancery Court, in consideration of the premises and the sum of $672.95, hath

granted, bargained and sold, and by these presents does grant, bargain, sell and convey unto the said C. W. Hunter as party of the second part hereto, and to his heirs and assigns forever, all the rights, title, interest or claim, either in law or in equity, of the parties to said suit in Chancery, and of all other persons or claimants having an interest in or to said lands described, as aforesaid, and all and singular the rights and privileges, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold said lands, with all appurtenances thereto, unto the party of the second part and his heirs and assigns
99 forever.

In witness whereof, the party of the first part hereunto sets his hand and affixes his seal as such Commissioner in Chancery, on the day first above written.

J. T. HADEN,
Commissioner in Chancery.

Deed Acknowledged and Approved.

STATE OF ARKANSAS, *County of Crittenden:*

In the Crittenden Chancery Court, at the January, 1899, Term Thereof, 16th day of January, 1899.

589. In Chancery.

BOARD OF DIRECTORS OF ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND AND TIMBER CO. ET AL.

On this day J. T. Hayden, the Commissioner appointed to execute the decree rendered in this cause, produces to the Court here his deed to C. W. Hunter, the purchaser of part of the lands and premises mentioned and described in said decree, and upon examination of the said deed the same is, in all things approved. And thereupon the said J. T. Haden, here in open court, acknowledges that he has executed said deed to said C. W. Hunter for the lands and premises therein described, to wit:

E. ½ N. E. ¼ and N. W. N. E. ¼ Sec. 3, T. 3 N. R. 7 E. W. ½ S. W. ¼ Section 3 N. R. 7 E.; W. ½ Section 4 T. 3. N. R. 7 E.; W. ½ S. E. ¼ Section 4 T. 3 N. R. 7 E.; All section 9 T. 3 N. R. 7 E.; W. ½ and S. E. ¼ Section 32 T. 4 N. R. 7. E.; W. ½ N. E. ¼ Section 32 T. 4 N. R. 7 E., for the consideration and purposes therein mentioned and set forth; and it is ordered by the Court that a copy of this order and acknowledgement be entered upon said deed, and certified by the Clerk under the seal of this court, to the end that the same may be entitled to record.

In testimony that the above and foregoing order and acknowledgement is a true and complete copy from the record of proceeding of the Chancery Court of Crittenden County, I, J. T. Haden, do hereby

set my hand as Clerk, and affix the seal of said Court, at my office, in said County, this 16th. day of January, 1899.

J. T. HADEN, *Clerk.*

Examined and approved in open court this 16th. — Jan. 1899.
E. D. ROBERTSON, *Chancellor.*

Certificate of Record.

STATE OF ARKANSAS, *Crittenden County:*

I, J. T. Haden, Circuit Clerk and *ex-officio* Recorder of the County aforesaid, do hereby certify that the annexed and foregoing instrument of writing was filed for record in my office on the 16th. day of January, 1899, at 3 o'clock P. M. and the same is now duly recorded with the acknowledgements and certificates thereon in Record Book "K—2" pages 292-3-4 & 5.

In witness whereof I have hereunto set my hand and affixed the seal of this court this 25th. day of January 1899.

J. T. HADEN,
Circuit Clerk and Ex-officio Recorder.
[SEAL.] By R. F. WARD, D. C.

100 *Decree.*

Crittenden County Chancery Court Record "H."

February Term, 1902, Page 343, February 28th, 1902.

Original Complaint. # 589.

THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND AND TIMBER CO. ET ALS.

and

A. B. BALLARD and JOSEPHINE W. BALLARD
vs.
THE BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT, C. W. HUNTER, A. HACKLER and J. P. HACKLER, Her Husband.

Complaint, Petition, Motion, and Answer.

This cause was this day heard upon the answer, motion, petition and original complaint of A. B. Ballard and Josephine W. Ballard filed herein on the 25th day of September 1899 and the agreement of counsel of the respective parties in writing, and on file and the several records and proceedings referred to in and made a part of the said agreement and the same having been argued by counsel of the respective parties and considered by the Court.

The Court orders that all the relief as prayed for in the said answer, motion, petition, and original complaint of the said A. B. Ballard and Josephine W. Ballard be and the same is hereby denied and refused and that the said answer, motion, petition, and original complaint be and the same is hereby dismissed.

To the rendering of the decree the said A. B. Ballard and Josephine by their counsel in open court at the time, excepted and now hereby leave of the Court note the exceptions.

And thereupon the said A. B. Ballard and Josephine W. Ballard prayed an appeal from the foregoing decree to the Supreme Court and the same is granted.

101 *Decree.*

Crittenden County Chancery Court Record "H."

February Term, 1902, Page 344, February 28th, 1902.

Original Complaint. # 589.

THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND AND TIMBER CO. ET ALS.

and

JOHN FRITZ, RICHARD H. ALLEN, HARRY ALLEN, MARY L. LATHAM, and Jno. C. Latham, Her Husband; Allen H. Allen, Thos. H. Allen, Floy G. Allen, John C. Latham, in His Own Right, John B. Leech, Phœnix Fire and Marine Insurance Co., The Memphis Savings Bank, The City National Bank of Cairo and C. W. Edmonds, as Assignee of the Hill Shoe Co.,
vs.
THE BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT and C. W. HUNTER.

Complaint, Petition, Motion and Answer. # 589.

This cause was this day heard upon the answer, motion, petition, and original complaint of Richard H. Allen and others filed herein on the 25th day of September 1899 and the agreement of counsel of the respective parties in writing, and on file, and the several records and proceedings referred to in and made a part of the said agreement and the same having been argued by counsel of the respective parties and considered by the Court.

The Court finds and orders that the relief as prayed for in the said answer, petition, motion and original complaint of the said Richard H. Allen and others should be and the same is hereby granted and that the sales and purchases set out in the said answer, motion, petition, and original complaint be and the same is hereby vacated and set aside.

And in pursuance of such findings and decree the Court now further orders, adjudges, and decrees that the sales made by J. T. Haden as Commissioner as set out in his report filed herein on the
20th day of July 1898, of the west half of the southwest
102 quarter of Section 3, 80 acres; the West half of the South
east quarter of Section 4, (480 acres); the West half of Section 4 (4) 320 acres; and section 9 640 acres; all in Township 3 North Range 7 East, and the purchasers thereof by Chas. W. Hunter as shown by the said report and the deed made by the said Haden as such Commissioner to the said Hunter under the said sales and purchases and the confirmation and approval of the said sale and purchase and deed be and the same are hereby vacated set aside and cancelled and that a copy of this decree be made and certified, to be paid for by the said John Fritz, and others, to the end that the same may be put of record in the Recorder's office as a muniment of title.

But the said Hunter having paid on account of his purchase of the said lands at the said sales the sum in the aggregate of Five hundred seventy two dollars and ten cents ($572.10) as reported by the said Haden as Commissioner, it is ordered that the same be repaid and returned to him and his receipt taken therefor.

And the said John Fritz and others in whose behalf relief is hereby granted are hereby required to pay to the Clerk of this Court or to the proper officer of the Board of Directors of the St. Francis Levee District all the Levee taxes remaining unpaid and due upon the said lands, including those for which the said sales were made and all penalties thereon at six per cent. per annum from the date of payment taking proper receipts therefor, and such sums so due are hereby declared a lien upon the said tracts of land respectively to be enforced hereafter by proper decrees should the same become necessary.

Or if the said Hunter has paid the said sums that the same and interest thereon from the date of payment at six per cent. per annum
be repaid him by the said John Fritz and others and his
103 receipt taken therefor.

To the foregoing decree the said Chas. W. Hunter by his attorney, in open court, excepts and by leave of the Court here notes his exceptions.

And the said Chas. W. Hunter nows prays an appeal from the foregoing decree to the Supreme Court and the same is granted.

104 *Supersedeas Bond.*

In the Chancery Court of Crittenden County, Arkansas.

Original Complaint. No. 589.

THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND AND TIMBER COMPANY AND OTHERS.

and

A. B. BALLARD and JOSEPHINE W. BALLARD
vs.
THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT, C. W. HUNTER, A. HACKLER, and J. P. HACKLER, Her Husband.

Complaint, Petition, Motion and Answer.

Whereas, the Appellants, A. B. Ballard and Josephine W. Ballard, have taken an appeal from the judgment or decree of the Chancery Court of Crittenden County, Arkansas, rendered at its February term, 1902, in the above styled cause, against the said A. B. Ballard and Josephine W. Ballard, in favor of the appellees, the Board of Directors of the St. Francis Levee District, C. W. Hunter, A. Hackler, and J. P. Hackler, her husband, named above, adjudging and decreeing against them the titles to the lands herein claimed and sued for by the said A. B. Ballard and Josephine W. Ballard, and also overruling and dismissing their complaint, petition, motion, and answer herein filed, and refusing and denying them any relief under the same, as more fully appears by the said decree so appealed from; and also decreeing against them the costs of the suit, and the said A. B. Ballard and Josephine W. Ballard desire to supersede the said judgment or decree:

Now, we the said A. B. Ballard, and Josephine W. Ballard, and—Fidelity and Deposit Company of Maryland—as their surety, hereby convenant with the said appellees, that the said appellant will pay to the appellees all the costs and damages that may
105 be adjudged against the said appellants on the appeal, or in the event of the failure of the appellants to prosecute the said appeal to a final judgment in the Supreme Court, or if the said appeal shall for any cause be dismissed, that the said surety shall pay to the appellees all costs and damages, and shall perform the judgment of the Court appealed from; also that the said appeal shall be prosecuted without delay; also that they, the said A. B. Ballard and Josephine W. Ballard, will satisfy and perform the judgment or decree, or order appealed from, in case it should be affirmed, and any judgment or order which the Court may render, or order to be rendered by the inferior Court, not exceeding in amount or value the original judgment or order, and all rents or damages to the prop-

erty during the pendency of the appeal, of which the appellees are kept out of possession by reason of the appeal.

Witness our hands, at Marion, Arkansas, this 25th day of March, 1902.

(Signed) JOSEPHINE W. BALLARD.
A. B. BALLARD.
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By FRANCES FENTRESS,
Member Local Board, Tenn.

Attest:

(Signed) GEO. H. GLASCOCK, *Agt.*

Approved March 28th, 1902.

(Signed) R. F. WARD,
Clerk of the Chancery Court of Crittenden County, Arkansas.

106

Supersedeas.

In the Chancery Court of Crittenden County, Arkansas.

Original Complaint.

THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND & TIMBER CO. and Others,

and No. 589.

A. B. BALLARD and JOSEPHINE W. BALLARD
vs.
THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT, C. W. HUNTER, A. HACKLER and J. P. HACKLER, Her Husband.

Complaint, Petition, Motion and Answer.

I hereby certify that an appeal has been granted to the Supreme Court, from the judgment rendered in this Court, at the February term, 1902, in favor of the appellees, the Board of Directors of the St. Francis Levee District, C. W. Hunter, and A. Hackler and J. P. Hackler, her husband, against the appellants A. B. Ballard and J. W. Ballard, adjudging and decreeing against them, the title to the lands claimed, and herein sued for by them, and ordering and decreeing that their complaint, petition, motion, and answer be dismissed, and refusing and denying them any relief thereunder, and also adjudging against them the costs of the suit, all as appears by the decree appealed from; and that a supersedeas bond has been executed within thirty days (30) after the appeal was granted:

Therefore the appellees, and all others are commanded to stay the proceedings on the said judgment or decree.

Witness my hand and seal of said Court, at office, at Marion, Arkansas, this 28th day of March, 1902.

(Signed) R. F. WARD,
Clerk Crittenden Chancery Court.

167 *Agreement of Counsel.*

In the Chancery Court of Crittenden County, Arkansas.

Equity Docket No. 589.

THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT
vs.
THE MEMPHIS LAND AND TIMBER CO. and Others,

and

In the Matter of the Controversy Between A. B. Ballard and Josephine W. Ballard, of the One Part, and A. Hackler, Wife of J. P. Hackler, and C. W. Hunter, of the Other, Arising upon the Answer, Motion, Petition and Original Complaint of A. B. Ballard and Josephine W. Ballard, Filed in the Original Cause.

It is agreed between the counsel of the respective parties, that the correct description of the land in controversy as appears in the record should be the North East quarter of Section 31, the Southwest quarter of Section 32, the South half of the Northwest quarter of Section 32, all in Township (4) Four North, Range Seven (7), and that the description as written in the answer, Motion, Petition and Original Complaint, and in the agreed state of facts, and other portions of the record, showing that the land is in Township 3 North, instead of Township 4 North, is a mistake.

It is hereby agreed between the counsel of the respective parties, that the said mistake shall be corrected in all parts of the said record, and that the case shall be determined in the Supreme Court with reference to the land involved correctly described.

(Signed) RANDOLPH & RANDOLPH,
For BALLARDS.
L. P. BERRY AND
A. B. SHAFER,
For C. W. HUNTER.

108 *Costs Chancery Court.*

Crittenden Chancery Court.

Bill for Costs.

BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT
vs.
MEMPHIS LAND & TIMBER COMPANY.

R. F. Ward, Clerk, Clerk's Costs.....	$6.00	Due.
R. F. Ward, Transcript, ½ paid by A. B. Ballard....	34.27	
	$40.27	

That is to say Ballard pays $17.13½.

STATE OF ARKANSAS, *County of Crittenden:*

I, R. F. Ward, Clerk of the Circuit Court in and for sais County, do certify that the above and foregoing is a true and correct bill of costs in the above styled cause including the cost of Transcript in said cause.

Witness my hand and official seal as such clerk.

[L. S.]

R. F. WARD, *Clerk.*

Costs in Sup. Court.

Due appellee printing Briefs..... $15.00

Attest:

P. D. ENGLISH, *Clerk.*

109 [Endorsed:] No. 589. The Board of Directors of the St. Francis Levee District, *vs.* The Memphis Land & Timber Co. Original Complaint. And A. B. Ballard and Josephine W. Ballard *vs.* The Board of Directors of the St. Francis Levee District, C. W. Hunter, and A. Hackler and J. P. Hackler, her husband. Complaint, petition, motion, and answer. Supersedeas bond approved, and filed *an* order granting supersedeas also made and filed, this 28th day of March, 1902. (Signed) R. F. Ward, Clerk.

110 *Certificate of Clerk.*

Clerk's Certificate of Transcript.

STATE OF ARKANSAS, *County of Crittenden:*

I, Robert F. Ward, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the annexed and foregoing pages contain a true and complete transcript of the records, proceedings and papers in the case of the Board of Directors of St.

Francis Levee District *vs.* Memphis Land and Timber Co. and others and in the matter of the controversy between A. B. Ballard and others, and A. Hackler and others, and between Thos. H. Allen and others, and C. W. Hunter and others, as therein set forth, and as the same appears of record, and on file in the Clerk's office of Crittenden County, Arkansas.

Witness my hand and official seal, this 23rd day of May, 1902.

[L. S.] ROBT. F. WARD, *Clerk.*

111 [Endorsed:] Eq. D. No. 589. Board of Directors of St. Francis Levee District *vs.* Memphis Land & Timber Co. and others, and in the matter of controversy between A. B. Ballard and others and A. Hackler and others. Agreement of Counsel correcting description of land in controversy. Crittenden County, Ark. Filed 10th day of April, 1902, at 9 a. m. (Signed) R. F. Ward, Clerk.

111½ *Proceedings in Supreme Court.*

STATE OF ARKANSAS, *In the Supreme Court, set:*

Be it Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of November A. D. 1903, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 2nd day of May, 1904, a day of said term:

A. B. BALLARD ET AL., Appellants,

v.

CHARLES W. HUNTER, Appellee.

Appeal From Crittenden Chancery Court.

This cause being regularly called is passed one week.

And at a subsequent term of said Court, on the 9th day of January, A. D. 1905, a day of said term, the following proceedings were had, to wit: The following causes being regularly called, on motion are passed to the days named: * * * A. B. Ballard *et al. vs.* C. W. Hunter, passed to January 23rd for oral argument.

And at the same term of said Court the following proceedings were had in said cause, to wit:

On the 23rd day of January, A. D. 1905:

The following causes being regularly called, come the parties, by their respective attorneys and solicitors, and said causes are submitted upon the briefs filed, and by the court taken under advisement: * * * A. B. Ballard *et al. vs.* C. W. Hunter: Crittenden Chancery Court: argued orally and submitted.

On the 28th day of January, A. D. 1905:

Ordered by the Court that the Clerk of this Court issue a writ of *certiorari* to correct the record in this cause.

112 And be it Further Remembered, That, at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House, in the City of Little Rock, on the 28th day, being the fourth Monday of November, A. D. 1904, amongst others were the following proceedings to wit: On the 11th day of February, A. D. 1905, a day of said term:

Decree Supreme Court.

No. 5062.

A. B. BALLARD ET AL., Appellants,
vs.
CHARLES W. HUNTER, Appellee.

Appeal From Crittenden Chancery Court.

This cause came on to be heard upon the transcript of the record of the Chancery Court of Crittenden County, and was argued by solicitors, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said Chancery Court in this cause.

It is therefore ordered and decreed by the Court that the decree of said Chancery Court in this cause rendered, be and the same is hereby in all things affirmed with costs.

It is further ordered and decreed that said appellees recover of said appellants and the Fidelity and Deposit Company of Maryland, surety in the supersedeas bond, all their costs in this court in this cause expended and have execution thereof.

113 STATE OF ARKANSAS, *In the Supreme Court, set:*

Be it Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 28th day, being the fourth Monday of November A. D., 1904, at the Court House, in the City of Little Rock, the following opinion was delivered by the Court in the case of

A. B. BALLARD ET AL., Appellants,
vs.
CHARLES W. HUNTER ET AL., Appellees.

Appeal From Crittenden Chancery Court.

Opinion.

114 No. 164.

In the Supreme Court of Arkansas, Feb'y 11, 1905.

BALLARD
v.
HUNTER.

Opinion.

BATTLE *J.:*

"This is an attack upon a sale of lands made by a commissioner in chancery pursuant to a decree foreclosing the lien of the Board of Directors of St. Francis Levee District for levee taxes, appellees having purchased the lands in controversy at said sale.

The decree condemning the lands and ordering the sale was rendered on Feb. 14, 1898, a day of the January term 1898 of the court: the sale was confirmed by the court during the July term 1898, and appellants appeared September 1899 and filed their complaint attacking the validity of the sale. They allege that the lands were owned by appellant Josephine Ballard, who was not a party to the foreclosure proceedings, and who was a non-resident of the state and had no information of the pendency of the suit; that no affidavit for warning order was made and that the warning order was not endorsed on the complaint.

Appellees entered their appearance, and from a decree dismissing the complaint for want of equity, the Ballards appealed. Appellants in their said complaint asked that it be considered by the court either as a motion for rehearing under the statute, or as an appearance by non-residents to vacate a judgment and have a new trial under section 6259 Kirby's Digest, or as an original complaint to quiet title, or as a bill of review and that relief be granted by cancelling the sale as a cloud upon their title.

The act of the General Assembly of 1895 p. 88 as amendatory of sec. 11 of the Act of 1893 creating said levee district provides that the payment of taxes assessed against the lands in the district shall be enforced by suit in the name of the Board of Directors of the levee district in the chancery courts of the several counties composing the district and that "said suit shall be conducted in accordance with the practice and proceedings of chancery courts in this State
115 except as herein otherwise provided, and except that neither attorneys nor guardians *ad litem*, nor any of the provisions of section 5877 Sand. & Hill's Dig. (Kirby's Dig. sec. 6254) of the statutes of Arkansas shall be required, and except that said suits may

be disposed of on oral testimony as in ordinary suits at law; and the law shall be liberally construed to give said assessment lists the effect of *bona fide* mortgages, for a valuable consideration, and a first lien on said lands as against all persons having an interest therein."

Said act further reads, in part as follows: 'Said proceedings and judgment shall be in the nature of proceedings *in rem*, and it shall be immaterial that the ownership of said lands may be incorrectly alleged in said proceedings; and said judgment may *ne* enforced wholly against said lands and not against any other property or estate of said defendant. All or any part of said delinquent lands for each of said counties may be included in one suit for each county, instituted for the collection of said delinquent taxes etc. as aforesaid, and all delinquent owners of said lands, including those unknown as aforesaid, may be included in said one suit as defendants; and notice of the pendency of such suit shall be given as against non-residents of the county, and the unknown owners respectively, where such suits may be pending, by publication weekly for four weeks prior to the day of the term of court on which final judgment may be entered for the said sale of said land.'

The form of the notice required is set forth *in extenso* in the statute, giving the nature of the suit and the description of the lands, concluding as follows: "Said persons and corporations, and all others interested in said lands, are hereby notified that they are required by law to appear and make defense to said suit, or the same will be taken for confessed and judgment final will be entered directing the sale of said lands for the purpose of collecting said delinquent levee tax etc.

The act further provides that 'at any time within three years after the rendition of the final decree of the chancery court herein provided for, the owner of the lands may file his petition in the court rendering the decree, alleging the payment of the taxes on said lands for the year for which they were sold, and upon the establishment of that fact the court shall vacate and set aside said decree.'

116 Appellants urge that the decree and sale thereunder were void for the reasons (1) that the short notice provided by the statute and the omission to take the lands in actual custody of law are insufficient to put the land owners upon notice and render the proceedings void as in violation of sec. 25 Art. V of the Constitution — of the Fourteenth Amendment of the Constitution of the United States: (2) That the lands in controversy were the property of appellant Josephine Ballard who was not named as a party defendant to the foreclosure suit: (3) that no affidavit was filed in said suit authorizing the issuance of publication of a warning order or notice: (4) that the warning order or notice was not endorsed upon the complaint: (5) and that said lands were sold for illegal penalties and costs adjudged against them."

First. The act provides that notice of the pendency of an action for the enforcement of the collection of levee taxes, penalty and costs against lands shall be given to non-resident owners by publication thereof in some newspaper published in the county where the suit is pending for four weeks prior to the day of the term of the court on which final judgment may be entered for the sale of their

lands. Such notice in similar cases has uniformly been held reasonable. The law, of which they (owners) are bound to take notice, advises them that their lands in the levee district are subject to taxation for levee purposes, and of the times and places when and where they will be assessed and taxes levied thereon; when these taxes shall be paid, and if not paid suits will be instituted in certain courts to enforce the collection thereof by sale; and that notice of the pendency of the suit would be given them by publication in a newspaper published in the county wherein their lands lie. The law warns them (non-resident owners) of the necessity of being vigilant and gives them the information by which they can protect their property against sales; and provides that they, at any time within three years after the rendition of a final decree condemning their lands to be sold to pay the levee taxes, may have the decree and sale set aside by showing that they have paid the taxes, for which their lands were ordered sold, before the rendition of the decree. We, therefore, conclude that the notice is reasonable. Johnson *v.* Hunter, 127 Fed. Rep. 219, and cases cited.

117 2. The fact that the lands in controversy were the property of Mrs. Josephine Ballard and she was not made a party defendant to the suit instituted to enforce the collection of the taxes thereon does not affect the decree therein and the sale thereunder. The act provides that such suit and decree shall be in the nature of proceedings *in rem*, and that "it shall be immaterial that the ownership of the lands may be incorrectly alleged in said proceedings." Acts of 1895, p. 89.

3. The act provides that notice by publication shall be given to the defendants in suits instituted for the collections of levee taxes, who are non-residents of the county, where the suits are brought. The plaintiff in the complaint in the proceedings attacked in this suit stated who of the defendants therein were non-residents of the county in which the proceedings were pending; and such complaint was sworn to. This was sufficient to authorize notice by publication without a separate affidavit to the same effect. It was held in Sannoner *v.* Jacobson, 47 Ark. 31, that an affidavit and complaint may be included in one instrument of writing, if it contains all the essentials of both. The complaint in the proceedings attacked contained the essentials of the affidavit and is sufficient to answer the same purpose. Johnson *v.* Hunter, *supra*.

The act under which the aforesaid proceedings were instituted does not require a warning order to be entered on record or the complaint; and if it had the proceedings could not be attacked collaterally, unless such entry was made jurisdictional as it was in Gregory *v.* Bartlett, 55 Ark. 30; and it was not in this case. Clay *v.* Bilby, 78 S. W. Rep. 749.

5. A decree of a court of competent jurisdiction is not subject to a collateral attack because lands were sold thereunder for illegal penalties and costs. Harry E. Kelley *v.* Laconia Levee District, MSS. Opinions; Johnson *v.* Hunter, *supra*.

Decree affirmed.

118 And be it further remembered that, at the same term of court, on the 25th day of February, A. D. 1905, a day thereof, amongst others, the following proceedings were had, to wit:

Motion.

No. 5062.

A. B. BALLARD ET AL., Appellant,
vs.
CHARLES W. HUNTER, Appellee.

Comes appellants by solicitors and file their motion for an order in this cause showing that said appellants claimed and argued that the legislation of Arkansas, and the acts done under such legislation were in violation of Section 2, Article 4, Constitution of the United States, and of the 14th Amendment and that such questions were considered and decided adversely to appellants.

119 And be it Further Remembered, That at the same term of court, on the 4th day of March, A. D. 1905, a day thereof, amongst others, the following proceedings were had, to wit:

Order.

No. 5062.

A. B. BALLARD ET AL., Appellant,
vs.
CHARLES W. HUNTER ET AL., Appellees.

Appeal from Crittenden Chancery Court.

Ordered by the Court that the following order be made part of the decree of this court in this cause, and said decree is by the Court modified accordingly and this order incorporated as a part of said decree, viz.:

"On the hearing of this cause the appellants, A. B. Ballard *et al.* claimed and argued that the legislation of Arkansas, stated in the pleadings and attacked herein, and the acts done under said legislation, in the suit for levee taxes described in the pleadings, were in violation of Section 2, Article 4, of the Constitution of the United States and other portions thereof, and of the 14th Amendment to that Constitution, and that such questions were considered by the Court in its decision and decided adversely to the said A. B. Ballard and others, the appellants."

And that this order take effect as of the date of said decree, viz: February 11th, A. D. 1905.

120 STATE OF ARKANSAS, *In the Supreme Court:*

I, Peyton D. English clerk of the Supreme Court of Arkansas do hereby certify that the foregoing 122 pages contain a true perfect and compared transcript of the record and all proceedings had in said Supreme Court and the Chancery Court of Crittenden County, as the same appears of record and on file in this Court in the cause therein stated.

In testimony whereof I hereto set my hand and affix the seal of said Court at my office in the City of Little Rock, the capital of said State this 9th day of September A. D. 1905.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH, *Clerk.*

Clerk's fees paid by Randolph & Randolph, Att'ys, $45.00.

[Seal of the Supreme Court of Arkansas.]

Attest:

PEYTON D. ENGLISH, *Clerk.*

[Endorsed:] No. —. A. B. Ballard *et al. v.* C. W. Hunter. Transcript to U. S. Sup. Court, on Writ of Error.

Endorsed on cover: File No. 19,917. Arkansas supreme court. Term No. 123. A. B. Ballard and Josephine W. Ballard, plaintiffs in error, *vs.* Charles W. Hunter, A. Hackler, and The Board of Directors of the St. Francis Levee District. Filed October 3rd, 1905. File No. 19,917.

FILE COPY.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

Office Supreme Court U. S.
FILED
OCT 16 1906
JAMES H. MCKENNEY,
Clerk

A. B. BALLARD AND JOSEPHINE W. BALLARD,
Plaintiffs in Error.

VS.

No. 123.

CHAS. W. HUNTER, A. HACKLER AND THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT,
Defendants in Error.

Writ of Error to the Supreme Court of the State of Arkansas.

STATEMENT OF CASE FOR A. B. BALLARD AND JOSEPHINE W. BALLARD, PLAINTIFFS IN ERROR.

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,
Of Counsel for A. B. Ballard and Josephine W. Ballard.

PAUL A. DOUGLASS CO., PRINTERS, MEMPHIS.

In the Supreme Court of the United States

(October Term, 1906.)

A. B. BALLARD AND JOSEPHINE W. BALLARD,
Plaintiffs in Error.

VS. No. 123.

CHAS. W. HUNTER, A. HACKLER AND THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT,
Defendants in Error.

Writ of Error to the Supreme Court of the State of Arkansas.

STATEMENT OF CASE FOR A. B. BALLARD AND JOSEPHINE W. BALLARD, PLAINTIFFS IN ERROR.

The General Assembly of the State of Arkansas on the 15th day of February, 1893, by Act No. 19 of the year 1893, created eight counties, or portions of those eight counties, constituting what is known there as the "St. Francis Basin," a Levee Dsitrict, for the purpose of constructing and maintaining levees against the waters of the Mississippi River, and incorporated a Board of

Directors, and gave that board power to levy and collect levee taxes, and prescribed and authorized the use of the taxes for the location, construction and maintenance of the levees.

This act was amended by Act No. 75, and Act No. 100, of the same session, and subsequently by Act No. 71 of the Acts of the year 1895. These acts may be seen in the published Acts of 1893, pages 24, 119, 172; and published Acts of 1895, page 88, and the questions presented in this case arise out of those acts, and what has been done under them, and copies of the portions of them, material here, are printed in the appendix to the brief.

The original act declared that for the purpose of building, repairing and maintaining the levee authorized, the Board of Levee Directors should have the power and it was made its duty to assess and levy annually, a tax, not exceeding 5 per cent. of the increased value or betterment, estimated to accrue from protection given against floods from the Mississippi River by the levee, on all the lands within the Levee District, provided that there should first be a meeting of the owners of the lands in the respective counties within the Levee District, in each county, of which meetings notice should be given in a prescribed way, and that at the meetings the proposition to levy the annual assessment should be submitted to the land owners, and that if a majority of all the land owners in the Levee District appeared at the meetings in person, or by legal proxies, and two-thirds of those present voted for the assessment, then the levee tax should be assessed. See Section 5.

Other acts to be done were prescribed before the levy of the tax, and then it was declared in Section 7, that the Board of Directors should elect an assessor, a land owner in the district, from each county, and all of them should constitute the Board of Assessors for the Levee District, and each assessor for the county he represented, and should make an assessment of all the lands in the

district, in books to be provided by the Levee Board, for that purpose. The lands were required to be entered upon the books, in convenient subdivisons, as surveyed by the United States, with appropriate columns, showing the names and residences of the owners of such lands, and mortgages, of record, if any known to the assessors, and also a description of the lands, and the number of acres cleared, as nearly as the assessor could ascertain without measuring, and the value thereof, as assessed without levee protection, and the value thereof as estimated, increased by levee protection.

After the assessments had been made in the respective counties, by the assessors elected, respectively, those assessors were required to meet as a Board of Equalization, and to equalize the assessments in the respective counties, and the assessments as so equalized were declared to be the assessment of the Levee District for that year, and until the next assessment. See Section 8.

By Section 9, the Board of Levee Directors was required to hold a regular annual meeting on the second Tuesday in May of each year, at the place selected as the domicile of the Board of Directors, and the president of the board was required to lay before the board the annual report of the chief engineer, with the maps, papers and estimates accompanying the same, and the last assessment, showing *the aggregate sum* upon which a tax for levee purposes might be levied; and also a report of the treasurer of the board, showing *the financial condition* of the Levee District.

After examining *the reports*, the Levee Board was required to decide *what work* it would undertake to do during that official year, and *the rate* per cent. on *the aggregate increased value* of lands in the Levee District, that *would be necessary to raise* a sum sufficient to pay *for such work*, as provided in Section 5 of that act, pro-

vided that the tax to be levied should not exceed 5 per cent., as provided.

Section 10 of the act made the assessment a lien on the land assessed, in the nature of a mortgage, and provided that the assessment should bear interest.

And Section 11, provided for the election of a collector, to collect the levee taxes, and prescribed what he should do in order to effect the collection.

The collector was to be furnished with a list of the assessments of the county for which he was appointed, and required to proceed on the first Monday of October, to make collections. If the assessments were not paid within thirty (30) days then the collector was required, in the name of the Levee Board, to enforce the collection thereof, by Chancery proceedings, in the courts of the county in which the lands were situated, having Chancery jurisdiction. And the court was required to give judgment against the owner of the land for the amount of the assessment, and interest thereon, and a penalty of 25 per cent. on the amount of the assessment; and also all the costs of the proceedings, and to cause the lands to be sold by a commissioner to be appointed by the court.

The judgment, the act provided, should not extend to any property except the land charged with the assessment. If lands were offered for sale and no one should buy them for the amount of the taxes, penalties and cost due, then the treasurer of the Levee Board was required to buy them in the name of the Levee Board, and the commissioner was to make the Levee Board a deed for the lands thus bought.

The act declared that all persons having an interest in the lands, or recorded liens thereon, should be bound by the judgment and decree rendered in the suit, in the same manner as in other *Chancery suits*, saving to in-

fants and insane persons, having no guardian or curator, the rights they then had by law to appear and except to the said proceedings within twelve months after their disabilities were removed. (See Section 12.)

The act then declared that the suit provided for, should *be conducted* in the name of the St. Francis Levee District, and *in accordance with* the practice and proceedings of *Chancery Courts in Arkansas*, and that the law should be liberally construed, to give the assessments *the effect* of *bona fide* mortgages for a valuable consideration, *and a first lien* upon the said lands, as against all persons having an interest therein.

There was a proviso in Section 7, that no error in the description of the lands should invalidate the assessment, if sufficient description was given to ascertain where the land was situated. This did not dispense with a good description of the land proceeded against.

And Section 13 declared that no *informality or irregularity* in holding the meetings, or in the description or valuation of the lands, or in the names of the owners, or the number of acres therein, should be a valid defense in the suit provided for. This merely dispensed with objections for errors of form in the procedure. It did not touch defects of substance.

The original act provided that any person having an interest in the land sold, might redeem it within one year from the date of the sale, by paying the tax, cost, penalty, and a further penalty of ten per centum, as in other Chancery proceedings, except that such sale should be made for cash. (Section 11.)

But this provision was omitted in No. 71 of the Acts of 1895, and the result as held in Banks v. The Directors of the St. Francis Levee District, 66 Ark. 490, and in Gavin v. Ashworth, 4 Ark. Law Rep. 118, 91 S. W. Rep. 303, was that in sales made after the passage of the latter act, there was no redemption provided for by the statute.

The act last referred to, No. 71 of the Acts of 1895, substituted another section for Section 11 of the Acts of 1893, completely displacing that section, but in most respects re-enacting its provisions. The sales involved here were made after that act took effect.

In the section substituted, it was provided that the suit to be instituted to collect the levee taxes, should be *by Chancery proceedings,* in the court having *Chancery jurisdiction,* and that the court should give judgment against the persons claiming to be the owners of the lands, if known to the Board of Directors, for the amount of such assessments, and a penalty of 25 per cent., and interest from the end of the thirty days allowed for collection, at the rate of 6 per cent. per annum, and all the costs of the procedings.

The same section also provided that the proceeding and judgment should be in the nature of proceedings *in rem,* and that it should be immaterial that the ownership of the land might be incorrectly alleged in the proceedings, but the judgment should be enforced only against the land, and not against any other property or estate of the defendant. All the lands in any county, it was provided, might be included in one suit, and *all* delinquent owners of such lands, including those unknown to the Board of Directors, might be included in one suit, as defendants.

That section also provided that notice of the pending of the suit should be given as against *non-residents of the county,* and unknown owners, respectively, when such suit might be pending, by publication weekly, for four weeks prior to the day of the term of court on which final judgment might be entered for the sale of the land, in some newspaper published in the county where the suit was pending, and then prescribed the form of the notice, including *the style of the case* in which it was to be given.

That notice begun by stating that the "following named persons and corporations and all others having or claiming an interest in any of the following described lands, are notified that a suit is pending," in a designated court, to enforce the collection of certain levee taxes "on the subjoined list of lands, each supposed owners' lands being set opposite his, or her, or its name, respectively, together with the amounts severally due from each, to-wit:" Then the list of the lands, and the names of the supposed owners, with a descriptive list of the delinquent lands, and the amounts due thereon, respectively, were directed by the statute to follow.

The same section declared that as against any defendant who resided in the county where the suit was, and who appeared by the record of deeds in the county to be the owner of any of the lands proceded against, notice of the pending suit should be given by the service of personal summons of the court.

That section also declared that *after the notice prescribed had been given properly*, as prescribed, and no answers had been filed, or if answers were filed, and the cause decided for the plaintiff, that the court should decree the relief prayed in the complaint, and should direct the commissioner appointed to sell the lands described in the decree.

The section concluded by declaring: "Actual service of summons shall be had where the defendant is in the county, or where there is an occupant upon the land."

Acts of 1895, pp. 88-92.

This act also amended Section 13, of the original act, already stated, and declared that the suit should be conducted *in accordance* with the practice and proceedings *of Chancery Courts* in Arkansas, except that neither attorneys nor guardians, *ad litem*, nor any provision of Section 5877 of Sandel's & Hill's Digest of the Statutes of

Arkansas, should be required; and except that said suit should be disposed of on oral testimony, as in ordinary suits at law.

Acts of 1895, p. 92.

Under the legislation, as stated, a complaint was filed in the Chancery Court of Crittenden County, on December 21, 1897. The style of the case in the caption was "Board of Directors of the St. Francis Levee District, Plaintiff, v. Memphis Land & Timber Company, John Adams," and more than two hundred and fifty other persons or corporations, as defendants. (Record, pp. 9-14.)

A number of the defendants were alleged to be non-residents of Crittenden County, Arkansas, but whether they resided outside the State of Arkansas or not, the complaint did not state. (Record, p. 10.)

A. B. Ballard was named among those who resided outside Crittenden County, but Josephine W. Ballard was not named anywhere in the complaint. After the statement of the names of the defendants, the complaint begun: "The plaintiff, the St. Francis Levee District, states and represents to the court," etc. The complaint was not signed nor verified by the plaintiff, nor by any attorney for it, as required by the statute (Sandels & Hill's Digest, Sec. 5744; Kirby's Digest, Sec. 6120), but there was an affidavit purporting to have been made by Williams, stating that he was the attorney for the plaintiff, and that the chief officers of the St. Francis Levee District were absent from Crittenden County, and that the facts stated in the complaint were true. (Record, pp. 13-14.)

After the names of the defendants, the complaint referred to the act creating the Levee District, and the amendment to it (Record, p. 11), and stated that "the following lands lying and being situated in said Levee District, said county and State, and belonging to said

defendants named in the caption of this complaint, a list of which is hereto attached, and asked to be taken as a part thereof." etc. The list attached to the complaint contained the names of a great many persons and corporations and all the lands in Crittenden County, by what purported to be descriptions, on which the levee taxes had been assessed, and which had not been paid. Only the portions of the record having reference to the lands of A. B. Ballard and Josephine W. Ballard, and Thomas H. Allen, who also was making a contest as to other lands at the same time, are copied in this record.

(Record, pp. 11-12.)

In the list attached to the complaint, and nowhere else in the complaint, the particular lands involved in this suit were mentioned. The particular descriptions given of them are copied in the brief, and appear in the record, page 12. In the list it was simply stated that the lands described were assessed to A. B. Ballard. In the complaint (Record, p. 13), referring to all the lands embraced in the list attached to it, it was averred that they were assessed for the year 1894, and were likewise "assessed for at the same rate for 1894, 1895, 1896 and 1897." No distinction was made with reference to the assessments for the different years, nor was it stated when or how they were made. As shown by the list attached to the complaint (Record, p. 12) on two tracts sued and involved here, the taxes were claimed to be due for 1895, 1896 and 1897. And on the third tract, for 1895 and 1896 only.

No taxes were claimed to be due on those lands for the year 1894. After referring to the list of the lands attached to the complaint, the complaint simply stated that they "were duly assessed for taxes for levee purposes in the name of said defendants, whose names are written opposite to said tracts of land respectively, * * * and the taxes thereon being duly extended on the

tax books of said Levee District were duly returned by said collector, and now remain on said tax books as delinquent—the taxes on the said several tracts of land being as stated in the list hereinbefore referred to as a part hereof." (Record, p. 12.)

Then, after stating what had been done in the way of authorizing the levy of the levee taxes (Record, p. 12), the complaint alleged that all the lands in the District were duly assessed for taxation "as per the said increased value or betterment thereof by the assessors elected under said acts, and in accordance with the terms and requirements thereof, and the benefits or increased value as aforesaid, of the lands herein described, and referred to as belonging to said defendants, were assessed at the value of $2.00 for each and every acre thereof."

Nothing further was said in the complaint as to the method of making the assessments, nor what the increased value or betterment of any particular tract of land was, nor who the owner of any particular tract was, or who had an interest therein. (Record, pp. 12-13.)

After the statement with reference to the assesments of the levee taxes, the complaint alleged that the Board of Levee Directors elected a collector for Crittenden County —R. W. Barton—and that the said Barton, as collector, "on the first Monday in October, 1894, 1895, 1896 and 1897, proceeded to collect said taxes due on the lands of said Crittenden County." Then it was stated that "on the first Monday of October, 1894, said R. W. Barton, as collector, proceeded to collect said taxes due on said lands for 1894, within said Levee District, and that within the time limited by said statutes for the collection of said taxes, no taxes were paid by said defendants, nor by any one for them on their lands, as aforesaid, and all of said taxes on said lands, of said defendants here-

inbefore named in the caption of this complaint, are yet wholly unpaid and delinquent." (Record, p. 13.)

Nothing further was said as to the levee taxes, or what was done towards collecting them for the years 1895, 1896 and 1897. The lands in controversy were not sued for any taxes for the year 1894, and one tract was not sued for any taxes for the year 1897. (Record, p. 12.)

The complaint claimed a lien under the statute "on said lands of said defendants for said unpaid taxes, together with interest thereon at the rate of 6 per cent. per annum from the first Monday in November, * * * 1894, 1895, 1896 and 1897, until paid, and the penalty of 25 per cent. as provided and imposed by said statute for non-payment of said taxes, which taxes, without interest or penalty, amounted to the aggregate sum of $———." (Record, p. 13.)

The prayer was that "judgment be given plaintiff against said defendants for said aggregate amount of taxes, interest, penalty, and the costs of this proceeding, and that such judgment be decreed to be a first lien on said lands of said defendants above named, and that for the purpose of enforcing said decree said lands be condemned," etc. (Record, p. 13.)

The concluding part of the prayer to the complaint was "that a *warning order* issue for the non-resident defendants herein named, requiring them to answer the complaint of the plaintiff *at the next January term* of this court, and that summons issue as to the other named defendants." (Record, p. 13.)

No notice as to the non-resident defendants appears in the record, and hence none was given.

The Chancery Court of Crittenden County, in 1898, begun on the third Monday of January, 1898, which was the 17th day of that month.

Acts of Arkansas, Second Extra Session, 1897, No. 37, p. 93.

Nothing appears in the record to show why the Chancery Court of Crittenden County did not convene on the third Monday of January, 1898 (Record, p. 8), nor why it was in session on the 14th day of February, 1898 (Record, p. 14), which was about ten days after the termination by law of the January term, 1898, of that court.

On February 14, 1898, as the record shows (Record, p. 14-19), the cause came on to be heard, and the plaintiff, the Board of Directors of the St. Francis Levee District, also came by its attorney. The case was styled similarly to the style in the complaint.

It was first recited in the decree that the defendants, B. L. Armstrong and a great many others, who were named, but not including either A. B. Ballard or Josephine W. Ballard, had been duly served with summons in the case, but made default, and that other defendants (naming the Memphis National Bank, and a great many others), and among them A. B. Ballard, but not Josephine W. Ballard, "were constructively summoned by publication in a newspaper published in Crittenden County, Ark. (but not naming the newspaper), weekly for four weeks before this day, proof of which has been previously filed herein, and all of the above named defendants, except A. H. Chatfield, the Memphis Land & Timber Company, and the Arkansas Land Company, having failed to plead, answer, or demur to the complaint of the plaintiff, the court, on motion of the attorney for the plaintiff, awards a decree *pro confesso* as to them, in favor of the plaintiffs for the amount of the taxes, interest, penalty and costs due for their said lands." (Record, pp. 15-16.)

The decree proceeds: "Thereupon this cause was submitted to the court on the complaint of the plaintiff, and the answer of the said A. H. Chatfield, trustee, the Memphis Land & Timber Company, and the Arkansas Land Company, and the documentary evidence, the records

of the Board of Directors of the St. Francis Levee District, the records of the Board of Assessors of said Levee District, the assessment books, and the tax books for said Levee District for Crittenden County, the exhibits to the complaint, and the oral evidence of Hugh R. McVeigh, secretary of the Board of Directors of said district; W. H. Newsome, Dr. R. W. Barton, collector for Crittenden County, and Arthur Vance, assessor of said county, for said Levee District." (Record, p. 16.)

The court then found a state of facts (Record, pp. 16-17), substantially as set out in the complaint, but in some respects going beyond the allegations of the complaint, having reference generally to the lands and defendants proceeded against in the suit, but nothing special as to A. B. Ballard or Josephine W. Ballard, or their lands. They were not named anywhere in that part of the decree.

There was then a general decree that the plaintiff—the Board of Directors of the St. Francis Levee District—recover from the defendants severally, to be enforced wholly against "said lands" the amount of the taxes, interest, penalty and costs assessed, levied and extended against the lands belonging to each of said defendants, respectively, for the years 1893, 1894, 1895, 1896 and 1897, according to a list and tabulated statement copied in the decree. (Record, pp. 17-18.)

The statement as to the lands of A. B. Ballard and Josephine W. Ballard is copied in the brief.

There was a further decree that the total amount set opposite each several tract in the list of lands, was the amount of the taxes, interest, penalty and costs due thereon to the plaintiff, and that the same be a lien on each of said tracts, respectively.

The defendants, or any person for them claiming the lands, or any interest in them, were then given permission before the sale to pay to the clerk of the court the amount

of the taxes, interest, penalty and costs set opposite each tract of land in the statement, and the costs afterwards to accrue, as provided for in the decree, up to the time of the payment, and the clerk was directed to give a receipt for the payment, and note the fact on the record, and it was declared that the payment should discharge the decree against the tract of land paid on. (Record, pp. 18-19.)

The clerk of the court was then appointed commissioner and directed to sell the lands on which the lien had not been discharged as required, to the highest bidder for cash, after first having given notice of the sale by publication weekly for two weeks in some newspaper published either in Crittenden County, or some adjoining county, and if all the lands were not sold on the date advertised, the sale was directed to continue from day to day until completed. (Record, p. 19.)

The court then directed the clerk as commissioner to execute a deed of conveyance to the purchaser for the lands sold, and gave him a fee for doing so of $1.00, to be paid by the purchaser. If the land was not purchased by some other party, then the commissioner was directed to bid it off in the name of the Board of Directors of the St. Francis Levee District, for the whole amount due on it, and to execute a deed of conveyance to that district. The decree then prescribed the fees for the commissioner and printer, as follows:

(1) For furnishing the printer a list of lands to be advertised, five (5) cents per tract.

(2) For attending and making and reporting the sale, twenty-five (25) cents per tract.

(3) To the printer for publishing the notice, fifty (50) cents per tract.

It declared that those fees should be taxed as costs against each several tract of land, to be paid by the pur-

chaser, or the persons discharging the lien before the sale, and directed the comimssioner to report his proceedings to the court at the next term. (Record, p. 19.)

The commissioner filed his report of sale on July 20, 1898, showing all the sales made under the decree on the 13th and 14th days of June, 1898, and that A. Hackler and C. W. Hunter, respectively, became the purchasers of the tracts of land involved in this suit. (Record, pp. 21-22.)

That portion of the report having reference to the lands involved here, is copied in the brief.

The court entered a decree confirming the sales made at the July term, 1898, of the court. (Record, pp. 21-23.)

At the January term, 1899, of the court (Record, p. 25), the commissioner appeared in court and acknowledged the deed to A. Hackler for the tract of land purchased by her, and also the deed to C. W. Hunter for the lands purchased by him.

The substance of these orders as to the lands in controversy is copied in the brief.

At the September term, 1899, A. B. Ballard and Josephine W. Ballard obtained leave to file in the suit, their answer, motion, petition and bill of review, and to be made parties to the suit, with reference to the lands involved here, and the court ordered that their pleading be filed, and they were made defendants and parties to the suit for the purposes set out in such pleading. (Record, p. 26.)

This pleading is in the record, pp. 27-37, and in substance set out the title of A. B. Ballard and Josephine W. Ballard to the lands in controversy here, referring to the deeds by which they held them, of record in the recorder's office of Crittenden County.

It stated that they had not been made parties to the suit, and had not appeared in it, and had no knowledge

or notice of it, until after the sale of their lands. They were citizens of Georgia and Florida, respectively, and resided in those States, respectively, and outside of Arkansas, and had no knowledge or notice of the levy of the levee taxes, or the legislation authorizing them.

They denied that they had been brought before the court in the suit by any warning order or other publication, or any constructive service of process in the suit. They alleged that no affidavit had been filed in the clerk's office, at or after the commencement of the suit, stating any fact authorizing the clerk of the court to make a warning order, or to give notice to them by publication of the suit.

The clerk of the court did not make on the complaint, or otherwise any warning order, or order for notice, requiring them to appear in the suit. No publication of any warning order or notice was ever made in the suit as to them. No proof was ever made in the suit of the publication of any warning order, or notice to them. They denied that they, or their lands, had ever been brought before the court, or within its jurisdiction in the suit, or that the court had the power to decree a sale of their lands, or pass the title to them. They stated that the complaint had not stated that they were the owners of the lands, or claimed to be the owners. That their titles were of record in the office of the commissioner of State lands, and also in the office of the recorder of Crittenden County, and that the ownership of their lands was known to the Board of Directors of the St. Francis Levee District, and that the complaint had not alleged that the ownership of their lands was unknown to the plaintiff, or that the owners of the same were unknown, nor did any notice published ever state that the owners of their lands were unknown to the plaintiffs.

They then stated that no notice of the pendency of the suit as against non-residents of Crittenden County, and unknown owners with reference to their lands, when the

suit was pending, had ever been given by publication weekly for four weeks prior to the first day of a term of the court, or prior to the day of a term on which the final judgment for the sale of their lands was entered, and that the judgment or decree was rendered without notice to them, actual or constructive, and therefore, the same, and the proceedings under it were void.

After stating the decree as made (Record, p. 30), they stated that they had no title to or interest in the north half of the northwest quarter of Section 32, nor in the southeast quarter of Section 32; but their land was the southwast quarter of Section 32, and the south half of the northwest quarter of Section 32, and those two tracts had been taxed and charged jointly along with the other tracts embraced in the west half of Section 32, and the southeast quarter of Section 32, in which they had no interest, and for an amount charged for the taxes due on the whole 480 acres, when they owned only 240 acres of the said tracts, and their lands were liable only for the taxes properly chargeable on them. (Record, p. 31.)

The decree of sale, and sale were claimed to be void because of those facts. Objection was then made to the portion of the decree (Record, p. 31) fixing costs and fees to be paid out of the sales of their lands, and it was claimed that the court had no jurisdiction to make such decrees, and that the sales for the fees and costs so charged, and directed to be paid, were void.

The pleading stated, that as soon as A. B. Ballard and Josephine W. Ballard learned of the sales to Hackler and Hunter, to-wit, about March 10, 1899, they tendered to each of them the sums they had bid and paid out for the lands, and such additional sums as they were entitled to, or considered themselves entitled to, in order to allow redemption, and each Hunter and Hackler refused to permit redemption, or to name any sum they were willing to receive in order to perfect redemption. They brought into court, as the pleading alleged, the money,

and offered to deposit it as the court might order to complete the redemption. (Record, p. 32.)

The fact of the tender, as alleged is agreed to. (Record, pp. 40-41.)

The pleading then denied in words the recital in the decree of February 14, 1898, under which the sale was made, that A. B. Ballard or Josephine W. Ballard, or either of them, by name, or by description as unknown owners of the lands in controversy, had been severally, constructively summoned to appear in the suit by publication in a newspaper published in Crittenden County, and that proof of such fact had been previously filed in the suit, and stated that the statement was entirely untrue, and asked leave to contest the truth of it. (Record, pp. 32-33.)

The pleading then stated further, that nothing in the complaint, when taken as confessed or as the decree recited it, authorized or justified the decree, or the sale under it of their lands as against A. B. Ballard and Josephine W. Ballard. No testimony was introduced as to their liability, or the liability of their lands for the sums decreed against them. The court had no authority without evidence, to award a decree *pro confesso* against them, or as to their lands in favor of the plaintiff for the amounts of the taxes, interest, penalty and costs claimed to be due, and decreed to be due. The decree of sale was claimed to be void for those reasons. (Record, p. 33.)

Various provisions of the Acts of Arkansas, No. 19, of the year 1893, and No. 71 of the year 1895, were pointed out as invalid, as against A. B. Ballard and Josephine W. Ballard, with respect to the matters involved in this suit (Record, pp. 33-35), because in violation of designated provisions of the Constitution of the State of Arkansas, and also because they violate Clause 1, Section 2, Article 4 of the Constitution of the United States, and the provisions of the 14th amendment to that Constitution, declaring that no State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The prayer of the pleading was that A. B. Ballard and Josephine W. Ballard be allowed the benefit of certain statutes of the State of Arkansas applicable to cases of relief against judgments or decrees, specially referred to, and which are more particularly noticed in the brief; and further that their pleading be taken as a bill of review, if necessary to their relief in the suit. (Record, p. 35.)

There was then the prayer that all the parties to the suit, in which the decree had been rendered, and the proceedings had, including the Board of Directors of the St. Francis Levee District, and Hackler and Hunter, the purchasers, be treated as defendants to the pleading of A. B. Ballard and Josephine W. Ballard, for all the purposes of the relief prayed. Or if necessary, that the purchasers Hackler and Hunter be brought before the court by the service of summons, or by proper publication and made defendants. (Record, p. 36.)

It was then prayed that the decree of February 14, 1898, and all subsequent decrees affecting A. B. Ballard and Josephine W. Ballard, or their lands, be reviewed, reversed, vacated and set aside. That the decree confirming the sales of their lands to Hackler and Hunter, respectively, be vacated, set aside and held for naught. That the report of sale be also set aside, vacated and canceled; and the sales of their lands to Hunter and Hackler be vacated, set aside, and held for naught. That any deed made by the commissioner to Hunter and Hackler, respectively, or any one claiming under them, be also vacated, canceled and held for naught. That the title of A. B. Ballard and Josephine W. Ballard to the tracts of land, be cleared and quieted, and confirmed and

declared to be complete and perfect against the decrees and proceedings in the suit, and all the parties thereto. That they be permitted to pay the taxes legally and justly due on their lands, including penalties, interest and costs. And they alleged that they brought into court and offered to deposit the money required, or necessary for that purpose. If proper, and according to the course of the law, they prayed that they might be allowed to redeem the lands from Hackler and Hunter, respectively, upon paying them the sums of money to which they were entitled, in order to perfect redemption. And they alleged that they brought that money into court. If more appropriate according to law, then they asked to be allowed to increase the bids of Hunter and Hackler, respectively, for the lands they purchased, and they offered to increase the bids by 50 per cent. upon each bid; and alleged that they brought the money into court for that purpose.

They also prayed the proper judgment against the adverse parties for costs, and for general relief. (Record, pp. 36-37.)

No formal answer or plea was filed by the purchasers, Hunter and Hackler, or any one to the pleading filed by A. B. Ballard and Josephine W. Ballard, but there was and agreement that without any plea, the matter presented by the pleading of A. B. Ballard and Josephine W. Ballard should be heard as an agreed case, upon the Agreed Statement of Facts theretofore filed in the cause, and the evidence referred to therein; and that agreement (with a mistake of one word) was put of record in an order in the Minute Book. (Record, pp. 37-38.)

The agreed statement of facts is in the Record, pp. 38-41. That agreement stated that for the purposes of the trial of the issue between A. B. Ballard and Josephine W. Ballard, of the one part, and A. Hackler and C. W. Hunter on the other, arising upon the answer and motion

of A. B. Ballard and Josephine W. Ballard, and the answers or replies thereto of Hackler and Hunter, the state of facts set out was agreed to, and that that agreement was to have the effect of proof duly made upon the issues for the decision of the controversy.

After agreeing to the muniments of title of A. B. Ballard and Josephine W. Ballard to the land in controversy, and that they, respectively, were citizens and residents of the States of Georgia and Florida, and neither one was within the State of Arkansas when the suit was begun, but they had each remained citizens and residents of those States, resepctively, since that date; it was then agreed further that each one would testify that they had no knowledge of the suit or its pendency, or that the taxes for levee purposes had been levied upon their lands before the date of the sale of their lands in the suit, or the purchases thereof by Hunter and Hackler, or even that the laws on that subject had been enacted. (Record, pp. 39-40.)

It was further agreed that the record in this suit, including the complaint and any amendment, warning order or order of publication, proof of publication, any summons, or other process issued in the suit, and the returns of the officers thereon, and the publication of any warning order, or notice made in the "Marion Reform," a newspaper printed in Crittenden County, and the pleadings and proceedings in the suit, including all the orders, judgments and decrees, and any and all reports of sale and deeds made by the commissioner, having reference to the lands of A. B. Ballard and Josephine W. Ballard, or copies, where the originals could not be produced, might be used and read in evidence by either party for all the proper purposes of the controversy, subject only to objections for irrelevancy and incompetency. (Record, p. 40.)

The certificate of the clerk, authenticating the transcript sent from the Crittenden Chancery Court to the

Supreme Court of Arkansas, shows that all the records and other evidence used, are copied in the present transcript. (Record, pp. 78-79.)

The other matters in the agreed state of facts have already been stated.

The deed to Hackler is in the record, page 41; and the deed to Hunter is in the record, pages 69-71.

The cause was heard in the Crittenden Chancery Court on February 28th, 1902, upon the pleading of A. B. Ballard and Josephine W. Ballard, and the agreement of the parties in writing, and the record and proceedings referred to and made a part of the agreement, and the court decreed that the relief prayed by A. B. Ballard and Josephine W. Ballard be denied, and that their answer, motion, petition and original complaint be dismissed.

They excepted to the decree and prayed an appeal to the Supreme Court of Arkansas, which was granted. (Record, pp. 72-73.)

The case was heard in the Supreme Court of Arkansas on February 11th, 1905, on the transcript of the record from the Chancery Court of Crittenden County, and the court found that there was no error in the decree of that court, and affirmed the decree, with costs, and ordered that the appellees recover of the appellants all the costs of the cause. (Record, p. 80.)

The opinion of the Supreme Court of Arkansas is in the record, pages 81-83.

The decree was amended on March 4th, 1905, so as to certify that Federal questions had been presented and argued, and were considered and determined by the court adversely to A. B. Ballard and Josephine W. Ballard. (Record, p. 84.)

A writ of error from this court was sued out on August 4th, 1905, and the necessary bond was given, and the writ of error was allowed by the Chief Justice of the Supreme

Court of Arkansas on the 9th day of September, 1905, and service of the citation in error was acknowledged by some of the parties, and the citation was served on the others in August and September, 1905. (Record, pp. 1-4.)

The assignment of errors was filed in the Supreme Court of Arkansas, as required by the rule, and is a part of the transcript of the record, pages 5-8.

A good deal of the present record need not be considered on the present writ of error. Portions of it relate exclusively to the controversy between Thomas H. Allen, or his assigns, and Chas. W. Hunter, and others, and that case is not here for decision. It was decided in favor of Thos. H. Allen, or his assigns (record, pp. 73-74), and no appeal to the Supreme Court of Arkansas was ever perfected, by Hunter or others.

Under the statement just made, the record, pages 44 to 69, may be altogether omitted in considering this case, as that portion relates exclusively to the controversy just mentioned.

BRIEF FOR A. B. BALLARD AND JOSEPHINE W. BALLARD, PLAINTIFFS IN ERROR.

I.

We will present the first three assignments of error together. Substantially they are, that the sales to Hunter were void, because:

1. The lands belonging to A. B. Ballard and Josephine W. Ballard were not properly described in the complaint, or sued for the taxes they were afterwards sold for.

2. The two tracts of land belonging to A. B. Ballard and Josephine W. Ballard, viz., the southwest quarter of Section 32, and the south half of the northwest quarter of Section 32, were sold along with and as a part of the west half of Section 32, when A. B. Ballard and Josephine

W. Ballard did not own or claim the north half of the northwest quarter of that section.

3. The two tracts of land of A. B. Ballard and Josephine W. Ballard were sold as a whole under the description: the west half of Section 32, and as a part of that half section, and for the taxes on the whole of that west half, when A. B. Ballard and Josephine W. Ballard did not own, and were not chargeable with, the taxes on the north half of the northwest quarter of Section 32, which was a portion of the west half of that section.

It is claimed the sales were void because of the facts just stated.

Our positions are that the titles claimed by the purchasers—Hunter and Hackler—to the lands in controversy, which it is conceded (Record, p. 89) belonged to A. B. Ballard and Josephine W. Ballard, but for their purchases, depend entirely on a strict compliance with the statutes referred to, Act No. 19 of the year 1893, and Act No. 71 of the year 1895, in the assessment, the levy of the taxes, and the conduct of the suit, and cannot be maintained, except by showing affirmatively, not only a substantial compliance with their requirements, but an exact compliance, from the inception of the undertaking to have the levee taxes voted by the land owners, until the conclusion of the sales under the decrees in the suit, authorized to be brought, to enforce the collection of them.

As we have seen, not only were the lands by the Act of 1893 (Section 7), to be assessed in convenient subdivisions as surveyed by the United States, but the assessment books were required to show the names and residences of the owners, and the mortgages on the lands, and a description of them, and, approximately, the number of acres cleared. The collector was to be furnished the list of the assessments made (Acts of 1893, No. 19, Sec. 11, p. 31, and Acts of 1895, No. 71, Sec. 1, p. 88), and if they

were not paid the Board of Directors was required to enforce the collection of the whole by Chancery proceedings, and the court was required to give judgment against the persons claiming to be the owners of such lands, if known to said board, for the amount of such assessments, and the penalty and interest, and all the costs of the proceedings. It was only in case the ownership of the lands was not known to the board that any lands could be proceeded against without giving the names and residences of the owners, and the other particulars required to be in the assessments, and then the unknown owners of any particular lands (Acts of 1895, No. 71, p. 89), were required to be included as defendants, and the notice provided for was to be as against unknown owners when the suit was pending. And in order to protect unknown owners the act (Acts of 1895, No. 71, p. 90) specially provided that "where the owners were unknown that fact should be so stated in the published notice." This meant, of course, that the particular tract of land, whose owner was unknown, should be assessed just as other lands were assessed, omitting only the name and residence of the owner, and the notice should state he was unknown, and in that case the act declared (Acts of 1895, No. 71, pp. 89-90), "such lands might be proceeded against as above set forth for the collection of said assessments, penalties, interest and costs due thereon, as being owned by unknown owners."

The notice to be given "as against non-residents of the county" (Acts of 1895, No. 71, p. 89) was required by the act to contain "a list of the supposed owners, with a descriptive list of said delinquent lands, and amounts due thereon, respectively, as aforesaid," and then the notice was to conclude by warning those it was directed to that "judgment final would be entered, directing the sale of said lands for the purpose of collecting said delinquent levee taxes, together with the payment of interest, penalty *and costs allowed by law.*"

Acts of 1895, No. 71, p. 90.

The several tracts of land, and the respective owners of them, were recognized in the act (Acts of 1895, No. 71, p. 90) to be different and distinct by the provision that continuances might be granted for good cause shown "as to a part of said land, or defendants, without affecting the duty of the court to dispose finally of the others, as to whom no such continuances might be granted."

The court was required to see that in all cases "notice had been properly given as aforesaid." And then, where the case was made out, was by its decree to "grant the relief as prayed in the complaint," and direct the commissioner to sell the lands "described in the decree" for the sum of "the taxes due, together with the interest, costs and penalty" *due on each tract*, as described and sold, and if no third party would bid such sum, then the commissioner was to bid *such particular tract* off "in the name of the said Board of Directors of the St. Francis Levee District, bidding therefor the whole amount due as aforesaid."

Acts of 1895, No. 71, p. 91.

And finally, to protect every owner as to his land, as far as practicable, it was provided (Acts of 1895, No. 71, p. 89), "that such judgment shall be enforced wholly against said land, and not against any other property or estate of said defendant."

And further, the act declared (Acts of 1895, No. 71, p. 89), "said proceedings and judgment shall be *in the nature of* proceedings *in rem.*"

By Section 12 of the Act of 1893 (Acts of 1893, No. 19, p. 32), the rights of infants and insane persons, having no guardian or curator, as they then existed, "to appear and except to said proceedings within twelve months after their disabilities were removed," were preserved, and the Act of 1895 (Acts of 1895, No. 71, p. 91) saved the same rights. And, besides, the last act (Acts of 1895, No. 71, pp. 91-92) declared that the owner of the lands

might file his petition in the court at any time within three years after the rendition of the final decree, alleging the payment of the taxes on such lands, and upon establishing that fact, the court should vacate and set aside the decree.

By the statutes applicable to assessments for ordinary taxation, the lands of each owner are to be listed in appropriate columns opposite his name, by the description of each tract by section, or the largest subdivision, of which the same is capable, designating the number of the section, and the part thereof, and the Congressional township, or survey, and the value of each tract, determined by the assessor. And in all cases where practicable, and the land is owned by one person, or one or more persons jointly, the description, both on the tax books and delinquent lists, shall be in tracts of not less than 160 acres. And the delinquent list to be filed each year with the clerk of the County Court by the collector must describe the lands on which taxes are delinquent, as the same are described on the tax books.

And then the clerk of the County Court, after making the necessary corrections, must publish the list of delinquent lands, as thus made, with a notice of sale by the collector, on the 2d Monday of June then next, and before the day of sale record the list and notice of sale in a book kept for the purpose, and attach a certificate stating the facts at the foot, which becomes the sole evidence of the facts.

Kirby's Digest of the Statutes of Arkansas, Secs. 6976, 7024, 7083, and 7085-7086.

Compliance with the requirements of these statutes is essential to the validity of sales for ordinary taxes.

The courts treat them as mandatory—

Blackwell on Tax Titles (2d. Edn.), Ch. 5. p. 106, etc.

Black on Tax Titles (1st Edn.), Ch. 3, Secs. 27, etc., 34, etc.

Martin v. Allard, 55 Ark. 218.
Cooper v. Freeman Lumber Co., 61 Ark. 42, etc.
Logan v. Land Co., 68 Ark. 248.
Hunt v. Gardner, 74 Ark. 583.
Bonner v. Board of Directors of St. Francis Levee District, — Ark. —, and 92 S. W. Rep. 1124.
Martin v. Barbour, 34 Fed. Rep. 701, and 140 U. S. 634.
Gregory v. Bartlett, 55 Ark. 30.
Taylor v. The State, 65 Ark. 595.
French v. Edwards, 13 Wallace 511, etc.
Lyon v. Alley, 130 U. S. 184, etc.
Cooley on Taxation, Ch. 12, p. 258, etc. (1st Edn.).
Gaines v. Stiles, 14 Peters, 322, 331, etc.
Redfork Levee District v. St. L., I. M. & S. Ry. Co. (Ark.), 96 S. W. Rep. 117.

The two acts of the General Assembly, No. 19 of the Acts of 1893, Act of the 15th of February, 1893, Acts of 1893, p. 24, and Act No. 71 of the Acts of 1895, of April 2d, 1895, Acts of 1895, p. 88, and the other acts on the subject, show very clearly that it was the purpose of the General Assembly to tax each tract of land subject to taxation, not only according to the subdivisions in the public surveys made by the United States of the public lands, but also with reference to the ownership of each tract of land; that is to say, to tax each tract of land belonging to distinct owners separately, with reference to the ownership, as well as with respect to the subdivision, so that the owner of each tract might pay the taxes on it, and relieve it, without being obliged to pay the taxes levied on other tracts of land belonging to some other owner.

The title papers of A. B. Ballard and Josephine W. Ballard, as is agreed in this record, were of record in the recorder's office of Crittenden County, and they showed that A. B. Ballard and Josephine W. Ballard owned, and that they claimed to own, only the southwest quarter of Section 32, and the south half of the northwest quarter of Section 32, and the northeast quarter of Section 31, town-

ship 4 north, range 7 east. The first of these tracts contained 160 acres, the second 80 acres, and the third 160 acres.

In the complaint, Record page 12, the land proceeded against was described as:

"Township 4 north, Range 7 east.

West half southeast quarter, Section 32, town 4 north, range 7 east, 480 acres, assessed to A. B. Ballard—

Taxes for 1895.....$19.20
Taxes for 1896..... 19.20
Taxes for 1897..... 19.20

West half northeast quarter, Section 32, township 4 north, range 7 east, 80 acres, assessed to A. B. Ballard—

Taxes for 1895.....$ 3.20
Taxes for 1896..... 3.20
Taxes for 1897..... 3.20

Northeast quarter Section 31, township 4 north, range 7 east, 160 acres, assessed to A. B. Ballard—

Taxes for 1895.....$ 6.40
Taxes for 1896..... 6.40 "

In the decree of sale of the 14th of February, 1898, fixing the lien on the land, and ordering the sale of it for the payment of the levee taxes found to be due, the land was described as:

"Township 4 north, Range 7 east.

West half of southeast quarter, Section 32, township 4 north, range 7 east, 480 acres, assessed to A. B. Ballard—

Taxes for 1895.....$19.20
Taxes for 1896..... 19.20
Taxes for 1897..... 19.20

West half of northeast quarter, Section 32, township 4 north, range 7 east, 80 acres, assessed to A. B. Ballard—

Taxes for 1895.....$ 3.20
Taxes for 1896..... 3.20
Taxes for 1897..... 3.20

Northeast quarter Section 31, township 4 north, range 7 east, 160 acres, Assessed to A. B. Ballard—

Taxes for 1895.....$ 6.40
Taxes for 1896..... 6.40 "
(Record, p. 18.)

When the commissioner came to make the sale, or, at least, when he came to report the sale to the court, he reported that he had sold land as follows:

"A. B. Ballard, owner, northeast quarter Section 31, township 4 north, range 7 east, 160 acres, valued at $320.00, for the taxes for the years 1896 and 1897: Taxes, $12.80; interest, 58 cents; penalty, $3.20; costs, 95 cents; total taxes, $17.53. Sold to A. Hackler for $18.50.

Township 4 north, Range 7 east.

A. B. Ballard owner, west half and southeast quarter Section 32, 480 acres, valued at $690.00: For the taxes for the years 1894, 1895, 1896 and 1897; interest, $4.30; penalty, $14.40; costs, 95 cents; total taxes, $77.27. Sold to C. W. Hunter for $78.25.

A. B. Ballard owner, west half of northeast quarter of Section 32, 80 acres, valued at $160.00: Taxes for the years 1894, 1895, 1896, 1897; interest, 72 cents; penalty, $2.40; costs, 95 cents; total taxes, $13.67. Sold to C. W. Hunter for $14.50." (Record p. 22.)

When he acknowledged the deed to Hackler, the land conveyed was described as the "Northeast quarter Section 31, township 4 north, range 7 east, 160 acres." (Record, p. 25, and Record, p. 43.)

When he acknowledged the deed to Hunter, the land was described: "West half and southeast quarter, Section 32, township 4 north, range 7 east, 480 acres; west half northeast quarter, Section 32, township 4 north, range 7 east, 80 acres." (Record, p. 26.)

The deed to Hackler describes the land as "northeast quarter Section 31, township 4 north, range 7 east, 160 acres." (Record, p. 41.)

The deed to Hunter describes the land, "West half and southeast quarter, Section 32, township 4 north, range 7 east; west half northeast quarter, Section 32, township 4 north, range 7 east." (Record, p. 70.)

In the pleadings filed by A. B. Ballard and Josephine W. Ballard, they attack the sales by the commissioner to Hunter of the southwest quarter of Section 32, and the south half of the northwest quarter of Section 32, township 4 north, range 7 east, because those sales had been made without any suit or decree against those tracts of land authorizing the sale, and because they had not been separately sold by the proper descriptions, but had been illegally sold as a part of the west half of Section 32. In substance the objection was (1) that these particular tracts of land had not been sued, or decreed to be sold; and (2) that the whole west half of Section 32 had been sold as one tract of land, for one sum of money, when A. B. Ballard and Josephine W. Ballard owned only the southwest quarter of Section 32, and the south half of the northwest quarter of Section 32, and they had no title, and set up no claim to the north half of the northwest quarter of Section 32. The sale could not properly embrace any land not sued for the taxes, and not decreed to be sold, and the only land Hunter bought which had been sued for the taxes, as shown by the complaint, or decreed to be sold, as shown by the decree, was the west half of the southeast quarter, and the west half of the northeast quarter of Section 32, township 4 north, range 7 east, and A. B. Ballard and Josephine W. Ballard did not own, or claim any title to either of the tracts so described, and did not set up any claim in the pleadings they filed to either tract. Their land was the southwest quarter, and the south half of the northwest quarter of Section 32. There was no suit against either of those tracts by those

descriptions, and no order to sell either of them by such descriptions in the decree of February 14, 1898, the decree under which the sale to Hunter was made, and so the sales were void.

Patrick v. Davis, 15 Ark. 363.
Hershey v. Thompson, 50 Ark. 484.
Texarkana Water Co. v. The State, 62 Ark. 188.
Cooley on Taxation (1st. Edn.), Ch. 12, p. 279, etc.
Black on Tax Titles (1st Edn.), Secs. 38 and 220.
Blackwell on Tax Titles (2d Edn.), p. 123, etc., 281, etc., 381, etc.
Boyd v. Bright, 1 Story, C. C. R. 487.
Schattler v. Casinelli, 56 Ark. 172.
Tatum v. Croom, 60 Ark. 487, 491.

In Ronkendorff v. Taylor, 4 Peters 349, it was decided that a part of a lot may be sold for taxes, but if it be an undivided part, it must be so described in the published notice. The court said:

"Congress had two objects in view in requiring this notice to be given: (1) To apprise the owner of the property; and (2) to give notice to persons desirous of purchasing.

"These objects are important. It is necessary for the interest of the owner that he should be informed of a proceeding which, unless arrested by the payment of the tax, would divest him of his property. And it is of equal, if not greater, importance that the property should be so definitely described that no purchaser could be at a loss to estimate its value. It is not sufficient that such a description should be given in the advertisement as would enable a person desirous of purchasing to ascertain the situation of the property by inquiry. Nor if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property, yet the sale would be void, unless the same information had been communicated to the public in the notice. Its defects, if any exist in the description of the property to be sold, cannot be cured by any communication made to the bidders on the day of the sale by the auctioneer."

In this case, the description in the complaint, in the notice of the suit, in the decree of sale, and in the notice of sale under the decree should have corresponded, and each and all should have conformed to the description in the assessment made of the property of A. B. Ballard and Josephine W. Ballard for the levee taxes.

The report of the sale by the commissioner, and the deed he made, show that the west half and the southeast quarter of Section 32—480 acres—were sold and conveyed as one aggregate body or tract, for one price, namely, $77.27, as stated in the report of sale. A. B. Ballard and Josephine W. Ballard did not own the southeast quarter of Section 32, or the north half of the northwest quarter of Section 32, but only the southwest quarter of Section 32, and south half of the northwest quarter of Section 32. The two tracts A. B. Ballard and Josephine W. Ballard owned made up 240 acres, and the two tracts the commissioner undertook to sell and convey to Hunter, embracing such 240 acres, made up 480 acres. And thus the 240 acres, the lands of A. B. Ballard and Josephine W. Ballard, were sold to pay the levee taxes on the 240 acres they did not own or claim, as well as to pay the taxes on the 240 acres, part of the lands sold, which they did own.

This was nothing more than the taking of the lands of A. B. Ballard and Josephine W. Ballard, for the purpose of paying the taxes on the lands to which they had no title, and in which they claimed no interest, and therefore was the taking of their property without due process of law. If the other lands were not taxable, or if they belonged to the State, or the United States, then no levee taxes should have been charged on them. If those lands belonged to other individuals or corporations, and were taxable, then such levee taxes should have been charged only against the lands upon which they were levied, or their owners, and only those lands should have been sold for their payment.

The assessment of several village lots as a part of a fractional quarter section and the sale of "an acre off the east side," was held void.

Ballance v. Forsyth, 13 Howard 18.

The statute required the whole tract to be sold for delinquent taxes to the highest bidder, but for not less than the taxes, penalty and costs, and a sale of a less quantity than the whole for the taxes, penalty and costs was held void.

Richards v. Howell, 60 Ark. 215.

And selling several distinct tracts or subdivisions of land as one body, and for one aggregate price, or the taxes due on all, is illegal, and the sale is void and passes no title.

Pack v. Crawford, 29 Ark. 492.
Cocks v. Simmons, 55 Ark. 104.
Salinger v. Gunn, 61 Ark. 414.
Woolfolk v. Buckner, 60 Ark. 166.
Spain v. Johnson, 31 Ark. 314.
Pettus v. Wallace, 29 Ark. 476.
Birge v. Montgomery, 31 Ark. 491.
Crane v. Randolph, 30 Ark. 579.

There was no authority in the statutes for combining in one suit the levee taxes for more than one year. When in the same suit the levee taxes for 1894, 1895, 1896 and 1897 were sued for, definite and distinct allegations as to the assessments and levies for each year, and the efforts to collect, and the delinquencies, and the facts authorizing the suits, should have been made. The loose and imperfect statements made in the complaint (Record, pp. 12-13) were not what the law requires.

Redfork Levee District v. St. L., I. M. & S. Ry. Co., 96 S. W. Rep. 117 (Ark.).

The sale being void, the report of the sale, by the commissioner to the court, and the confirmation of his report by the court, and the deed made by him even with the

approval of the court, did not pass or affect the title of A. B. Ballard and Josephine W. Ballard to those two tracts. The sale and the deed, notwithstanding what was done, were still alike void.

Shrivers Lessee v. Lynn, 2 Howard, U. S. 25.
Gray v. Brignardello, 1 Wallace 627.
Minnesota Co. v. St. Paul Co., 2 Wallace 609, 640, etc.
Pike v. Wassell, 94 U. S. 711.
Freeman on Void Judicial Sales, Sec. 44, p. 146.
Gaines v. New Orleans, 6 Wallace 643, 714.
Kleber's Void Judicial and Execution Sales, Sec. 442 and Sec. 491.
Falls v. Wright, 55 Ark. 562, and 29 Am. St. R. 100.
Banks v. St. Francis Levee District, 66 Ark. 492-493.
Drake on Attachments, Sec. 89a.
Collins v. Paepcke-Leicht Lumber Co. (Ark.), 84 S. W. Rep. 1046, 74 Ark. 82, 87.
Cowling v. Nelson (Ark.), 88 S. W. Rep 915, and 3 Arkansas Law Rep. 377.

II.

The fourth error assigned is that the lands of the plaintiffs in error were sold for sums not legally chargeable thereon, and thereby they were deprived of them without due process of law, to-wit:

(a). For fees to the commissioner for furnishing the printer with a list of lands to be advertised;

(b). To the commissioner for attending, making and reporting the sale; and

(c). To the printer for publishing notice of the sale of each tract of land.

For the said reasons the decree of sale, and the sales of the lands of the plaintiffs in error were void.

In the decree of the 14th of February, 1898, ordering the sale, it was decreed that there should be allowed the commissioner fees as follows:

(a). For furnishing the printer with a list of lands to be advertised, 5 cents per tract;

(b). For attending, making and reporting the sale, 25 cents per tract;

(c). To the printer for publishing said notice, 50 cents per tract, which fees the decree directed should be taxed as costs against each several tract of land, to be paid by the purchaser or person discharging the lien before the sale. (Record, p. 19.)

It is agreed in the record of this case that the charges were made against the tracts of land sold, belonging to A. B. Ballard and Josephine W. Ballard, according to the requirements of the decree of sale, and were taxed as costs against the lands, and were paid out of the proceeds of the sale by the commissioner after the sales had been completed. (Record, p. 40.)

Act No. 71 of the Acts of the General Assembly of the year 1895, the act under which the suit was brought, and the decree of sale rendered, in providing for the notice to be given to those interested in the delinquent lands proceeded against, directed that the notice should specify, among other things, that a judgment final would be entered, "directing the sale of said lands for the purpose of collecting said delinquent levee taxes, together with the payment of interest, penalty *and costs allowed by law.*"

Acts of 1895, p. 90.

In authorizing the judgment, or decree, to be pronounced for the sale, the act declared only that the court should give judgment in the suit provided for against the persons claiming to be the owners of the lands "for the amount of such assessments, and said penalty of 25 per cent., and interest on said assessment from the end of said thirty days allowed for collection thereof, at the rate of 6 per cent. per annum, and all costs of the proceedings."

Acts of 1895, p. 88.

There was nothing in any of the legislation undertaking to give power to the Chancery Court, or any court, in the suit, to allow, or fix, the fees or costs to accrue in the suit, or to charge such fees or costs on the lands to be sold under the decree, to be pronounced, or paid out of the proceeds of the sales of such lands.

The Constitution of Arkansas divides the government of the State into three distinct departments, and prohibits the judicial department from exercising any legislative power, except in instances expressly provided or permitted in the Constitution. (Article 4.) And, in addition, the Constitution (Sec. 4, Art. 16), provides that the General Assembly shall fix the salaries and fees of all officers in the State, and that no greater salary or fee than that fixed by law shall be paid any officer, employe or other person. The Legislature has provided for and regulated all fees and costs by general laws, and has made it a misdemeanor for any officer to charge, demand or receive any more, or greater, fees for his services than are allowed by law.

Sandels & Hill's Digest, Chap. 64, Sec. 3358; and Kirby's Digest, Chap. 64, Sec. 3542.

Our position is that the Chancery Court, in the suit for the levee taxes, had no power to direct the charging of the fees and costs objected to, or to direct their payment out of the proceeds of the sale, and that that provision of the decree, and the taking of the sum authorized to be charged out of the proceeds of the sales of the lands belonging to A. B. Ballard and Josephine W. Ballard, rendered the sales of those lands void, such charges being illegal, and constituted the taking of their property without due process of law.

In reply to this position the court below merely said: "A decree of a court of competent jurisdiction is not subject to a collateral attack because lands were sold thereunder for illegal penalties and costs." (Record, p.

83, and 74 Ark., p. 181.) For the statement made the court cited as authority Kelly v. Laconia Levee District, opinion delivered on the same day, 74 Ark. 202, and Johnson v. Hunter, a decision by Trieber, District Judge, 127 Federal Reporter 219.

If there is anything in Kelly v. the Laconia Levee District on the question, we fail to discover it, and Johnson v. Hunter at the time this case was decided below, was on appeal in the Circuit Court of Appeals of the United States for the Eighth Circuit, and that court recently, on the —— day of August, 1906, reversed the decree, and granted Johnson and others, the plaintiffs and appellants, the relief prayed in their bill, and dismissed the cross-bill of Hunter and others, who occupied in that case the same position that Hunter and others occupy in this case, one of the decrees of sale involved there being the identical same decree in question here.

The objection we make is that the complaint in the suit presented no question as to the right to charge the fees and costs complained of, and that the Crittenden Chancery Court, in embracing them in its decree of sale, not only went outside the complaint, but went outside the statute, and without right put into the decree the adjudication that costs and fees should be paid which had not been sued for, and which the law did not authorize to be recovered. The selling of the lands for the illegal fees and costs was subsequent to the general order in the decree to charge them, and there has been no particular adjudication as against A. B. Ballard and Josephine W. Ballard that the charging of them was proper as against their lands, since the general order in the decree of sale.

The very question that we desire to present in this case is whether or not the Crittenden Chancery Court, in pronouncing the decree of sale as to the matter we now complain of, was a court of competent jurisdiction to make the decree, and the further question whether or not

we are making, in this case, a collateral attack on the decree, and the court below has disposed of our contentions by simply assuming a state of facts the opposite of the facts we rely on, and which we are obliged to controvert in order to present the questions.

In Elsey v. Falconer, 56 Ark. 419, the complaint in an overdue tax suit alleged that the taxes on the land proceeded against were due for a certain year only, and the warning order gave notice that the suit was for those taxes. A judgment or decree by default was entered in the suit, and that judgment included unpaid taxes on the same land for other years, in addition to the year mentioned in the complaint and notice. A sale was made of the land, under the decree, and the question was whether the purchaser got a good title. Hemmingway, Judge, said: "When the court went outside the right asserted in the complaint, and attempted to adjudicate rights not therein set up, or in any way referred to, it exceeded its power, and its decree, insofar as it determines such rights and orders their enforcement, was without jurisdiction and void." 56 Ark. 422. After stating the fact that the decree had adjudicated the claim asserted in the complaint and notice, for taxes, and had included a claim for taxes not asserted in the complaint, or mentioned in the notice, and stating that the sale had been made of the land under the decree for the whole, the judge said he had found no direct authority upon the effect of such a sale. He referred to Litchfield v. Cudworth, 15 Pickering (Mass.) 23, and Adams v. Morrison, 4 New Hampshire 166, and Sillsbee v. Stockle, 44 Mich. 561, and then said that, after much hesitation, the court had concluded that the sale was void as to the land sold—that is, that the purchaser got no title by his purchase.

In Falls v. Wright, 56 Ark. 562, the widow filed a petition in the Probate Court to have commissioners appointed to ascertain and report her dower in lands described in the petition. The commissioners reported

dower in those lands, and also assigned dower in lands not described in the petition. The Probate Court confirmed the action of the commissioners, including their action in assigning dower in the land not embraced in the petition. The court held the decree absolutely void as to the land not described in the petition on a collateral attack. In the opinion the court referred to Giffard v. Hort, 1 Schoales & LeFroys 108; Gore v. Stackpole, 1 Dowling 30; Colclough v. Sterum, 3 Bligh 186; Munday v. Vail, 34 New Jersey (Law) 420; Corwithe v. Griffing, 21 Barbour (N. Y.) 9, and Reynolds v. Stockton, 43 New Jersey (Equity) 211. And see Swing v. St. Louis Ref. & W. G. Co., an opinion by the Supreme Court of Arkansas, handed down on the 24th of March, 1906, where a judgment of the Supreme Court of Ohio was denied effect, because the pleadings and proceedings showing that court was empowered to render the judgment were not produced.

93 S. W. Rep. 978.

And see also—

Owings v. Hull, 9 Peters 624-625; and
Hallum v. Dickinson, 47 Ark. 120, 124.

There is nothing in this record preventing the consideration by this court of the question whether the sale of the lands of A. B. Ballard and Josephine W. Ballard was unlawful, because made for fees, or for costs not legally chargeable thereon. They were not brought lawfully before the court by the personal service or process, or by notice, and never appeared in the suit before the decree of sale. Josephine W. Ballard was not only not named as a defendant in the suit, but her name does not appear anywhere in the record until she entered her appearance to make the present contest. The costs or fees now objected to were not sued for in the suit, and were not fixed by law as the legitimate result of the decree of sale made. If, as a matter of law, those fees and costs were not charges, or due on the day of sale from A. B.

Ballard and Josephine W. Ballard, or their lands, then the sale of the lands for that reason alone was void, as the sale was not due process of law.

Collins v. Paepcke-Leicht Lumber Co., 84 S. W. Rep. 1044; 74 Ark. 86.
Cowling v. Nelson (Ark.), 88 S. W. 914, and 3 Ark. Law Rep. 377.

A sale of land for taxes in excess of the amount due, or embracing costs not legally chargeable, even though the excess, or the costs, amount only to a few cents, is void.

Goodrum v. Ayers, 56 Ark. 93.
Pack v. Crawford, 29 Ark. 491.
Cooper v. Freeman Lumber Co., 61 Ark. 36.
Salinger v. Gunn, 61 Ark. 414.
Alexander v. Gordon, 101 Fed. Rep. 95.
Muskegon Lumber Co. v. Brown, 66 Ark. 539.
Darter v. Houser, 63 Ark. 476.
Harvey v. Douglass, 73 Ark. 221.

An exception to the rule was made in Cowling v. Muldrow, 71 Ark. 488, where the amount of the taxes due was $4.28 3-4, and the sale was for $4.29 on the maxim "*de minimis non curat lex.*" But it is the only exception which has been made so far as we can ascertain.

If the collector is authorized to sell only enough of the land to pay the taxes, and offers and sells the entire tract, or sells more than enough property to pay the taxes due, the sale is void.

Stead's Exrs. v. Course, 4 Cranch 403.
French v. Edwards, 13 Wallace 506.

Mason v. Fearson, 9 Howard 248.

A sale of land purporting to be for the taxes due for a number of years, when only the taxes for a part of such years are due, is void.

Mitchell v. Kinsworthy, 21 Ark. 154-155.

Elsey v. Falconer, 56 Ark. 419.
Gage v. Pumpelly, 115 U. S. 454.
Drake v. Ogden, 128 Illinois 603.
Gage v. Lyons, 138 Illinois 590.

In the courts of Arkansas and in the courts of the United States it is settled that fees and costs, beyond those provided in the statutes governing, cannot be recovered by one party from another in any suit, and that the courts are without power to make orders or render judgments or decrees for them outside the statutes.

Thorn v. Clendenin, 12 Ark. 60.
Crittenden County v. Crump, 25 Ark. 235.
Standford v. Wheeler, 28 Ark. 144.
Cole v. White County, 32 Ark. 50.
Fanning v. The State, 47 Ark. 442.
Logan County v. Trimm, 57 Ark. 487.
Wilson v. Fussell, 60 Ark. 194.
State v. Blackburn, 61 Ark. 407.
Cowling v. Nelson, 88 S. W. Rep. 914 and 3 Ark. Law Rep. 377.
O'Neil v. K. C., F. S. & M. Ry. Co., 31 Fed. Rep. 663.
United States v. Marsh, 106 Fed. Rep. 474.
United States v. Shields, 153 U. S. 88, 91.

The remedy for the collection of ordinary taxes is not only summary, but generally is such as the Legislature prescribes and no other.

Cooley on Taxation, Chap. 14, p. 300.
Black on Tax Titles, Sec. 44.
Murray v. Hoboken Land & Improvement Co., 18 Howard, 272.
Loan Association v. Topeka, 20 Wallace 660.
McMillen v. Anderson, 95 U. S. 37.

The levy and collection of all such taxes is the exercise of a legislative power, and not only is summary, but usually the courts have no agency in the matter unless specially called in by the legislation. Such taxes are burdens or charges imposed to raise money for public purposes, but they are not debts (Lane County v. Oregon,

7 Wallace, 75), and, in the absence of a statute authorizing it, a suit at law, or in equity, cannot be maintained for their recovery.

Heine v. Levee Commissioners, 19 Wallace, 655.

In many of the States there have been statutes providing for judgments or decrees in courts of record, as a part of the process of collecting ordinary taxes, but such judgments or decrees have usually been pronounced without the bringing of any formal suit against the particular tax debtor, and without any special notice to him, and have never been supposed to attach even as against him, any judicial sanctity to the process of collecting the taxes made through their instrumentality, or to be anything more than an act of some legislative agent in the course of the proceeding to accomplish the collection. The case of Elsey v. Falconer, already referred to, is an example.

And French v. Edwards, 13 Wallace, 514, decided the question.
And see Walker v. Turner, 9 Wheaton, 541; and Moore v. Brown, 11 Howard, 414.

And for others see:

Woods v. Freeman, 1 Wallace, 398.
McClung v. Ross, 5 Wheaton, 116.
Thatcher v. Powell, 6 Wheaton, 119.
Gregory v. Bartlett, 55 Ark. 30.
Martin v. Barbour, 34 Fed. Rep. 701 and 140 U. S. 634.
Riverside Co. v. Howell, 113 Ill. 259.
Gage v. Pumpelly, 115 U. S. 454.
Dick v. Foraker, 155 U. S. 404.
Beidler v. Beidler, 71 Ark. 318.
McMahan v. Smith, 69 Ark. 591.
Memphis Land & Timber Co. v. Board Directors St. Francis Levee District, 70 Ark. 409.
Pope v. Campbell, 70 Ark. 207.
Williams v. Harris, 4 Sneed (Tenn.) 332.
Hightower v. Freedle, 5 Sneed (Tenn.) 312.
Randolph v. Metcalf, 6 Coldwell (Tenn.) 400.
Caldwell v. Barrett, 71 Ark. 310.

There is a well recognized distinction between ordinary taxes and special assessments for local improvements, such as the levee taxes in question here. The distinction is so broad that an exemption from ordinary taxes will not relieve from liability for special assessments for local improvements. (Illinois Central R. R. v. Decatur, 147 U. S. 190.) The theory on which special assessments for local improvements are levied, is that the property upon which they are imposed is peculiarly benefited and, therefore, that the owners do not, in fact, pay anything in excess of what they receive by reason of the improvements.

Carson v. The St. Francis Levee District, 59 Ark. 514, 536, etc.
Hagar v. Reclamation District, 111 U. S. 104, etc.
Shoemaker v. United States, 147 U. S. 297.
Norwood v. Baker, 172 U. S. 269.

Such assessments involve a radical interference with the rights of private property, and, from their very nature must be imposed and collected under a special grant of power by the Legislature, and the methods precribed for the assessment and collection must be followed with even greater strictness than the method prescribed for the assessment and collection of ordinary taxes. The general rule is that lands cannot be sold for the payment of special assessments for local purposes, made upon them, without specific legislation providing for such sale —the ordinary authority to sell for public taxes not being applicable to such cases.

Paine v. Spratley, 5 Kan. 525.
Lyon v. Alley, 130 U. S. 177.

III.

THE FIFTH ASSIGNMENT OF ERRORS.

The Acts of the General Assembly, under which the suit was brought, required a notice to be given to the

owners of the lands, of the suit, and no notice having been given A. B. Ballard and Josephine W. Ballard, the decree of sale, and the sale of their lands, for want of such notice, were void.

The record fails to show any notice to either A. B. Ballard or Josephine W. Ballard, unless the recital in the decree of sale establishes the fact of notice as against them, and estops them from raising the question of notice. That question will be discussed elsewhere. We will present here the question whether or not notice was required, and the effect of its not having been given in the suit.

Act No. 19, of the Acts of 1893, p. 24, declared that the suit provided for to recover the levee taxes should be by Chancery proceedings in the court having Chancery jurisdiction, and authorized that court, in that suit, "to give judgments against the owners of the lands for the amounts of the assessments, and interest thereon, and a penalty, and the costs of the suit, and to cause the lands to be sold by a commissioner appointed by the court."

In other sections it provided (Sec. 11, p. 31, and Sec. 13, p. 32) that the suit should be conducted in accordance with the practice and proceedings of Chancery Courts in Arkansas, and that the law should be liberally construed to give the assessment lists the effect of *bona fide* mortgages, for a valuable consideration, and a first lien upon the lands assessed against all persons having interests in them.

Before this suit was begun, although it embraced levee taxes for 1893 and 1894, the General Assembly had amended the Act of 1893 by Act No. 71, of the Acts of 1895. That act declared that all or any part of the lands in any county might be included in one suit, for the collection of the taxes, and that all the delinquent owners

of such lands, including those unknown, might be included in such suit, as defendants.

It then declared that "A notice of the pendency of such suit shall be given, as against *non-residents of the county*, and unknown owners, respectively, when such suit may be pending, by publication weekly, for four weeks prior to the day of the term of the court on which final judgment may be entered, for the sale of the lands, in some newspaper published in the county where such suit may be pending."

The statute prescribed the form of the notice, and, in doing so, stated the case as follows:

"St. Francis Levee District
v. Notice.
"Delinquent Lands,"

thus making the style of the case, as well as the matter of the notice, statutory.

The notice begun by declaring: "The following named persons and corporations, and all others having or claiming an interest in any of the following described lands, are hereby notified that suit is pending in the Circuit Court of —— County, Arkansas, to enforce the collection of certain levee taxes on the subjoined list of lands, each supposed owner's lands being set opposite his or her or its name, respectively, together with the amounts severally due from each, to-wit:" The statute then required that there should follow "a list of supposed owners, with a descriptive list of said delinquent lands, and amounts due thereon, respectively, as aforesaid." It then prescribed the conclusion of the notice as follows: "Said persons and corporations, and all others interested in said lands are hereby notified that they are required by law to appear and make defense to said suit, or the same will be taken for confessed, and judgment final will be entered directing the sale of said lands, for the purpose of

collecting said delinquent levee taxes, together with the payment of interest, penalty and costs allowed by law.

"_____,

" Clerk of said Court."

(Acts of 1895, pp. 89-90.)

After the conclusion of the form of the notice, the statute declared, "and where the owners are unknown, that fact shall be so stated in said published notice." (Acts of 1895, p. 90.) The statute then required "as against any defendant who resides in the county, where such suit may be brought, and who appears by the record of deeds in said county to be the owner of any of the land proceeded against, notice of the pending suit shall be given by the service of personal summons of the court at least twenty days before the day on which said defendant is required to answer as set out in said summons." (Acts of 1895, p. 90.)

A subsequent part of the same section of the statute provided: "Actual service of summons shall be had where the defendant is in the county, or where there is an occupant upon the lands." (Acts of 1895, p. 92.)

In regulating the judgment to be pronounced, the Act of 1895 declared, "that in all cases where notices have been properly given, as aforesaid, and where no answer has been filed, or if filed and the cause decided for the plaintiff, the court, by its decree, shall grant the relief as prayed in the complaint, and shall direct said commissioner to sell the lands described in the decree." (Acts of 1895, p. 91.)

In prescribing the effect of the judgment, the statute declared: "Said judgment shall provide for sale of said delinquent lands, for cash, by a commissioner of the court, after advertisement as hereinafter set out. Said proceedings and judgment shall be in the nature of proceedings *in rem*, and it shall be immaterial that the ownership

of said lands may be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against said land and not against any other property or estate of the defendant." (Acts of 1895, p. 89.)

In declaring the effect of the sale by the commissioner the statute provided "said commissioner shall, by proper deeds, convey to the purchasers the land so sold, and the titles to said land shall thereupon become vested in such purchaser as against all others whomsoever, saving to infants and insane persons, the rights given them by Section 12 of the said Act of February 15, 1893." (Acts of 1895, p. 91.)

In its opinion the court below said: "The fact that the lands in controversy were the property of Mrs. Josephine W. Ballard, and she was not made a party defendant to the suit, instituted to enforce the collection of the taxes thereon, does not affect the decree therein, and the sale thereunder. The act provides that such suit and decree shall be in the nature of proceedings *in rem*, and that it shall be immaterial that the ownership of the lands may be incorrectly alleged in said proceedings.'" (Record p. 83.) This was nothing less than deciding that there is no necessity, under the law, that the owner of the land have notice of any character of the suit, or be even made a party defendant to it.

Notwithstanding the announcement of the court we insist that in all cases of proceedings in the nature of proceedings *in rem*, it is settled, in accordance with the provisions of the Statute of Arkansas (Sandel's & Hill's Digest, Sec. 4190, Kirby's Digest, Sec. 4424), that notice to the defendants, or the parties in interest, whose property is proceeded against, or is to be bound by the proceedings in the suit, must be given in the suit, or the judgment or decree, and the proceedings thereunder are void, and without force for want of such notice.

Surely the Supreme Court of Arkansas would not be understood as deciding, or as being ready to decide, that

the land of a resident of Crittenden County, not personally summoned in the suit, or the land of an owner personally in the county, or the land of an owner having an occupant upon it, not served with a summons, would be bound by a decree of sale where he did not appear in the suit, so as to lose his title to his land by a sale under such a decree. If not, does it intend to hold, or would it hold, that A. B. Ballard and Josephine W. Ballard are bound by the decree and sale here, simply because they resided outside of Crittenden County?

We do not have in this case the question of the effect of a decree of sale in Admiralty for several reasons. In the first place the Crittenden Chancery Court is not a Court of Admiralty. In the second place real estate is not the subject of Admiralty jurisdiction.

Harriman v. Rockaway Beach Pier Co., 5 Fed. Rep. 461.
Rock Island Bridge, 6 Wallace 213.

And lastly it is beyond the power of a State Legislature to confer upon State courts jurisdiction in Admiralty.

The Hine v. Trevor, 4 Wallace 556.

We concede that the several States may by statute authorize proceedings strictly *in rem*. The cases relating to proceedings in the Probate Courts having reference to the probate of wills, the administration of estates and the guardianship of infants, are of that character.

Marr ex parte, 12 Ark. 84.
Rogers v. Wilson, 13 Ark. 507.
Sturdy v. Jacoway, 19 Ark. 499.
Montgomery v. Johnson, 31 Ark. 82-83.
Beidler v. Friedell, 44 Ark. 414.
Apel v. Kelsey, 52 Ark. 342.
Thompson v. Tolmie, 2 Peters, 157.
Grignon v. Astor, 2 Howard 319.
Florentine v. Barton, 2 Wallace 210.

Cornett v. Williams, 20 Wallace 226.
Davis v. Gaines, 104 U. S. 386.
Manson v. Duncanson, 166 U. S. 533.

And the statutes and decisions furnish many other instances in which judgments or decrees in proceedings strictly *in rem*, provided for in State legislation where there is a requirement of a sufficient general notice, may be sustained, even as against persons having an interest, but having, in fact, no personal notice of the proceedings.

Evans v. Perciful, 5 Ark. 524.
Bonnell v. Roane, 20 Ark. 114.
Scott v. Pleasants, 21 Ark. 367.
Wallace v. Brown, 22 Ark. 118.
Worthen v. Radcliffe, 42 Ark. 344-345.
McLain v. Duncan, 57 Ark. 49.
Porter v. Dooly, 66 Ark. 1.
Overman v. Parker, 18 Howard 137.
Thomas v. Lawson, 21 Howard 331.
Huling v. Kaw Valley Railway, 130 U. S. 559.
Arndt v. Griggs, 134 U. S. 316.
Lynch v. Murphy, 161 U. S. 247.
Hamilton v. Brown, 161 U. S. 256.
Leigh v. Green, 193 U. S. 89.
Cunnius v. Reading School District, 198 U. S. 458.

But Act No. 19 of the year 1893 and Act No. 71 of the year 1895 in question here do not provide for any proceeding strictly *in rem*.

Wilson v. Gaylord, 92 S. W. Rep. 26, and 4 Arks. Law Reporter, p. 341.

In Freeman v. Alderson, 119 U. S., Justice Field took the distinction between actions *in rem* and actions *quasi in rem* in these words: "Actions *in rem*, strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs. The property itself is in such actions the defendant and, except in cases arising during war for its hostile character, its forfeiture or sale is sought for

the wrong in the commission of which it has been the instrument, or for debts or obligations for which by operation of the law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case. There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to the citizens of the State, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated, but they differ among other things from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties."

119 U. S. 187-188.

In Arkansas it has been decided a great number of times that a judgment rendered without notice is void.

Cross ex parte, 7 Arks. 44.
Pile ex parte, 9 Arks. 336.
Gibson ex parte, 10 Arks. 572.
Miller v. Barkeloo, 8 Arks. 318.
Baskins v. Wylds, 39 Arks. 347.
Levy v. Ferguson Lumber Co., 51 Arks. 317.
Greenstreet v. Thornton, 60 Arks. 369.
Silver v. Luck, 42 Arks. 268.
Bozeman v. Browning, 31 Arks. 377.
Ford v. Adams, 54 Arks. 137.
Barkman v. Hopkins, 11 Arks. 157.
Iglehart v. Moore, 16 Arks. 46.

Wilson v. Gaylord, 4 Arks. Law Rep., p. 341, and 92 S. W. Rep., p. 26.

But the decisions of the courts of Arkansas do not control in this case. The question of notice of a suit to a party whose person or property is to be affected by the judgment, especially where he is a citizen of another State, is a question arising under the Constitution of the United States. Notice to such party is essential to constitute the proceeding and judgment due process of law. And the notice must be given within the jurisdiction of the sovereignty whose court renders the judgment.

Justice Gray said in Scott v. McNeil, 154 U. S. 46: "No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party."

And see:

Harris v. Hardeman, 14 Howard, 343-346.
Earle v. McVeigh, 91 U. S. 503.
Harkness v. Hyde, 98 U. S. 476.
Kibbe v. Benson, 17 Wallace 624.
Alexandria v. Fairfax, 95 U. S. 774.
Amy v. Watertown No. 1, 130 U. S. 301.
Knowlton v. Watertown, 130 U. S. 327-334.
St. Clair v. Cox, 106 U. S. 350.
Goldey v. Morning News, 156 U. S. 518.
Conley v. Mathieson Alkali Works, 190 U. S. 411.
Pana v. Bowler, 107 U. S. 529.
Cheely v. Clayton, 110 U. S. 701.
Wilson v. Seligman, 144 U. S. 41.
Pennoyer v. Neff, 95 U. S. 714-727.
Bischoff v. Weathered, 9 Wallace 812-814.
Haddock v. Haddock, 201 U. S. 567-568.

In Hagar v. Reclamation District, 111 U. S. 707-708, after referring to Davidson v. New Orleans, 96 U. S. 97, 104, the court said: "By 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be

pursued in the ordinary mode prescribed by the law. It must be adapted to the end to be attained, and whenever it is necessary for the protection of the parties, it must give them an opporunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property, which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

In Windsor v. McVeigh, 93 U. S. 274, this court decided (1) that the sentence of a court against a party, without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. (2) That the jurisdiction acquired by the seizure of property in a proceeding *in rem*, for its condemnation for alleged forfeiture, is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and the parties interested to appear and be heard upon the charges for which the forfeiture is claimed. To that end some notification of the proceedings, beyond that arising from the seizure, describing the time within which the appearance must be made, is essential.

The principle stated was applied to the suits brought under the Acts of Congress during the war of the rebellion, providing for the confiscation of the property of persons engaged in rebellion against the government of the United States, and the case referred to was one of that class of cases.

See Earle v. McVeigh, 91 U. S. 503-510.
Alexandria v. Fairfax, 95 U. S. 774.

In New Orleans Water Works v. New Orleans, 164 U. S. 471, a proposition in the syllabus is: "In the absence

of parties interested and without their having an opportunity to be heard, the court is without jurisdiction to make an adjudication affecting them." In the course of his opinion Justice Harlan said: "We do not suppose that any precedent can be found that would justify a court of equity in giving such relief (relief against a party not before the court). A decree declaring the ordinances in question void would have no effect upon the rights of the beneficiaries named in the ordinances for, in the absence of the parties interested, and without their having an opportunity to be heard, the court would be without jurisdiction to make an adjudication affecting them. Such a decree would appear upon the very face of the record not to be due process of law, and could be treated everywhere as a nullity." (164 U. S. 480.)

In Earle v. McVeigh, 91 U. S. 509-510, this court said: "Even in proceedings *in rem* notice is requisite in order that the sentence may have any validity." In Stuart v. Palmer, 74 New York 183, a well considered case, these propositions were decided:

"(1) A law imposing an assessment for a local improvement, without notice to and a hearing, or an opportunity to be heard, on the part of the owner of the property to be assessed, has the effect to deprive him of his property without due process of law, and is unconstitutional.

(2) The Legislature may prescribe the kind of notice and the mode in which it may be given, but it cannot dispense with all notice.

(3) It is not enough that the owner may by chance have notice, or that he may, as a matter of favor, have a hearing. The law must require notice and give a right to a hearing.

(4) So also it is immaterial that the assessment has been in fact fairly apportioned. The constitutionality

of the act is to be tested not by what has been, but by what may be, done under it." (74 New York, 190-191.)

In Scott v. McNeil, 154 U. S. 46-47, the court said: "Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually or by the thing condemned being first seized into the custody of the court. The Mary, 9 Cranch. 143-144; Hollingsworth v. Barbour, 4 Peters 466-475; Pennoyer v. Neff, 95 U. S. 714-727. And such a judgment is wholly void if a fact essential to the jurisdiction of the court did not exist." In Roller v. Holly, 176 U. S. 398, a judgment in a proceeding *in rem* was held void because sufficient notice was not given to the owner of the land of the suit in which it was sold.

In Turpin v. Lemon, 187 U. S. 51, a case involving general taxes, a paragraph of the syllabus is: "Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court. While it has been held that notice must be given to the owner at some stage of the proceeding for condemnation or imposition of special taxes, it has also been held that laws for the assessment and collection of general taxes stand upon a somewhat different footing, and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary (Mr. Justice Field's definition of due process of law in Hagar v. Reclamation District, 11 U. S. 701, followed), and the Fourteenth Amendment is satisfied by showing that the usual course prescribed by the State laws requires notice to the taxpayers, and is in conformity with natural justice."

In the opinion Justice Brown said: "Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occasion to hold that in

proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvement, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential. Spencer v. Merchant, 125 U. S. 345; Huling v. Kaw Valley Railway, 130 U. S. 559; Hagar v. Reclamation District, 111 U. S. 701; Paulsen v. Portland, 149 U. S. 30." 187 U. S. 57-58.

In Hodge v. Muscatine County, 196 U. S. 276, where the statute in question imposed a lien on the real property of the landlord, occupied by a tenant, for the tax on the business carried on upon it by the tenant, the necessity of notice to the landlord, so as to give him an opportunity to test the validity of the tax at some time before the tax became final, was fully recognized, and the decision against the landlord as to the liability of his land for the tax was put on the ground that under the general law of the State he had been given notice of the assessment, and an ample opportunity to make defense as to the liability of the property for the tax. In this connection the court said: "If the taxpayer be given an opportunity to test the validity of the tax at any time before it is made final, whether the proceedings for review take place before a board having a *quasi* judicial character, or before a tribunal provided by the State for the purpose of determining such questions, due process of law is not denied." (196 U. S. 281.)

Carson v. St. Francis Levee District, 59 Ark. 513, was decided on the 21st day of July, 1894, and Act No. 71 of the Acts of 1895 in question here was passed on the 2d day of April, 1895. The opinion in Carson v. The St. Francis Levee District clearly conveys the idea that, under Act No. 19 of the Acts of 1893, notice of the suit authorized, though not required in express words by the act, was necessary under the proper construction of Section 11 of that act. (59 Ark. 536.) And in the Memphis Land & Timber Co. v. the St. Francis Levee District, 64

Ark. 258, though only the levee taxes for the years 1893 and 1894 were sued for, the court laid stress upon the requirement of Act No. 19 of the Acts of 1893, that the suit should be conducted in accordance with the practice of Chancery courts, and that the statute should be liberally construed to give the assessment lists the effect of *bona fide* mortgages, for a valuable consideration, and a first lien on the property. (64 Ark. 263-264.)

Usually the construction of the constitution and statutes of a State is for the courts of that State and the courts of the United State adopt the settled construction as established by such State courts. But the principle is not applied in any case where a violation of the Constitution of the United States is involved, or is the question to be decided. In that class of cases the courts of the United States are not controlled by the decisions of the courts of any State. They decide the law for themselves. Whether the obligation of a contract has been impaired, or whether a citizen has been deprived of his property without due process of law and similar questions are determined, when presented in the courts of the United States, without reference to the local laws, or decisions of the courts of the State where the controversy arose, even upon their own constitution or statutes.

This court in this case, therefore, must put its own construction upon Act No. 19 of the Acts of the General Assembly of the year 1893, and Act No. 71 of the General Assembly of the year 1895, and is in no way bound or controlled in this case by the construction put by the Supreme Court of Arkansas on those statutes, so far as they are brought in question here, and the case requires the determination of the questions whether or not A. B. Ballard and Josephine W. Ballard have been deprived of their property by those statutes, or by the judgment or proceedings of the court below, without due process of law, or have been denied the benefit of the laws of the State of Arkansas, or have been denied the privileges and

immunities of citizens of the United States, or have been denied the privileges and immunities of citizens of Arkansas, or have been denied the equal protection of the laws within that State. Since the Fourteenth Amendment became a part of the Constitution these propositions have been beyond dispute.

In Scott v. McNeil, 154 U. S. 34, the court said: "Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law than when the question is whether the statute created a contract, which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case this court must decide for itself the true construction of the statute."

154 U. S. 45.

And see Butz v. City of Muscatine, 8 Wallace, 582-584.

Pennoyer v. Neff, 95 U. S. 733, etc.

Burgess v. Seligman, 107 U. S. 32, etc.

Carroll County v. Smith, 111 U. S. 562, etc.

Anderson v. Santa Anna, 116 U. S. 362, etc.

Spencer v. Merchant, 125 U. S. 352, etc.

Huntington v. Attrill, 146 U. S. 683, etc.

Mobile & Ohio Rialroad v. Tennessee, 153 U. S. 492, etc.

Great Southern Hotel Co. v. Jones, 193 U. S. 542, etc.

It is not possible to reconcile the opinion of the court below in this case, and the decree now in question on this writ of error, to the effect that it was not material that Mrs. Josephine W. Ballard was not made a party to the suit, and that her absence from the suit does not affect

the decree, or the sale thereunder as to her title, with other decisions made by the same court both before and after this case was decided below.

In Greenstreet v. Thornton, 60 Ark. 369, the proceeding was, under the statute (Sandel's and Hill's Digest, Sec. 5344, etc.), to collect an assessment for a local improvement, and there was a sale of the property, under the decree pronounced, and a conveyance to the purchaser under the sale. A suit was brought by the heir at law of the person alleged in the complaint to be the owner, to set aside the decree of sale, and to cancel the deed of the purchaser. The person named as defendant in the suit with reference to the property sold was dead when the suit was brought, and the title was then in his heir at law, and there was a warning order as to him, based upon a summons returned, not to be found, and a publication under the statute as to such dead person. The notice was general to the unknown owner, whoever he might be (60 Ark. 373), but there was no allegation in the complaint, as required by the statute, of the fact that the owner was unknown, and so that method of giving notice was not authorized by the statute. The court held that the decree in the suit was void, and that the sale passed no title, and that the heir at law of the deceased alleged owner could attack the decree and the sale collaterally, and pronounced a decree canceling them.

In Wilson v. Gaylord, 92 Southwestern Reporter 26, and 4 Arkansas Law Reporter 341, decided January 20, 1906, the plaintiff, to make out his title, showed a conveyance to him by a commissioner in chancery, under a decree of the Chancery Court, in a suit brought by the Board of Directors of the St. Francis Levee District, under one of the statutes in question in this case, No. 19 of the Acts of the year 1893, against certain named individuals to enforce the payment of levee taxes exactly similar to those sought to be enforced in this suit. It was not shown in that suit that the defendants, who were named

in the complaint, had any title to the land sold. The court held that the decree and sale established nothing more than that the title possessed by the defendants named passed to the purchaser at the sale under the decree; that the suit was *in personam* against those defendants only, and affected the rights of no persons who were not parties to that proceeding; that the decree was personal as to those parties for the amount of the levee taxes, penalty and costs, and a lien on the land only as to them and their privies, and as it had not been shown that they had any title to the land sold at the time the decree was rendered, that the purchaser acquired no title. Greenstreet v. Thornton was referred to and approved.

Recurring to the record in this case, it will be found that the suit was not against the "Delinquent Lands," as seems to have been contemplated in the Act of 1895 (Acts of 1895, p. 89), nor in the name of "The St. Francis Levee District," which was named there as the plaintiff in the suit authorized, but was by the Board of Directors of the St. Francis Levee District, and against individuals, beginning with the Memphis Land and Timber Company, and naming many others, all persons or corporations, assumed to own, or to have interests in, the lands proceeded against. (Record, p. 9.)

The prayer of the complaint was that "a warning order issue for the non-resident defendants herein named requiring them to answer the complaint of the plaintiff." (Record, p. 13.)

And when the decree came to be pronounced, under which the sales now complained of were made, the case was styled "The Board of Directors of the St. Francis Levee District v. the Memphis Land and Timber Company, et al., defendants," and the decree proceeded then to name a large number of persons or corporations as defendants, being substantially the same who had been named as defendants in the complaint (record, p. 14, etc.), and, in the decretal part, to adjudge that the Board of

Directors of the St. Francis Levee District "do have and recover, of and from the defendants severally, to be enforced against said lands, the amount of the taxes, interest, penalty and costs assessed, levied and extended against the lands belonging to each of said defendants, respectively." (Record, p. 17.)

In Hassall v. Wilcox, 130 U. S. 493, one of the cases referred to for authority by the judge delivering the opinion in Wilson v. Gaylord, just mentioned, Justice Blatchford, delivering the opinion of the court, said: "One of the exceptions taken by Wilcox to the master's report was that the master had, by his finding, nullified the legal force and effect of the judgment of the State court. The Circuit Court may have proceeded on that ground in its decree. But we do not think that the proceeding in the State court can be sustained as one *in rem*. It is essential to such a proceeding that there should be at least constructive notice by some form of publication, or advertisement, to adverse claimants, to appear and maintain their rights before a judgment in such a proceeding can operate, even as *prima facie* evidence. (Windsor v. McVeigh, 93 U. S. 274, 278, 279.) In the present case no notice, either personal or constructive, was provided for by the Texas statute, or was given to the other lien holders."

130 U. S. 504.

The provision in section 10 of Act No. 19, of the Acts of 1893 (p. 30), that "said assessments shall be a lien on said lands in the nature of a mortgage, and shall bear interest," taken in connection with the requirement (Sec. 11, p. 31, and Sec. 13, p. 32, Acts of 1893, and Sec. 2, p. 92, Acts of 1895) that the law shall be liberally construed "to give the assessment lists the effect of *bona fide* mortgages for a valuable consideration and a first lien upon the lands assessed against all persons having interests in them," necessarily required that the suit be conducted substantially as a suit in equity to foreclose a mortgage. A mortgage always presupposes an equity in redemption

in the mortgagor, and it is the peculiar solicitude of a court of equity to protect that equity of redemption in every reasonable way. To this end there is never a decree of foreclosure, or of sale for foreclosure, until the mortgagor is before the court by the service of process, or notice, or has appeared. And then by the decree pronounced foreclosing the mortgage, the court always sees that the mortgagor has the benefit of his equity of redemption, by time given him to pay the mortgage debt before the sale, or by providing for him the right to redeem from the sale. These provisions of the statute, therefore, of themselves required the service of process upon, or notice to, A. B. Ballard and Josephine W. Ballard in this suit before the decree for the sale of their lands was passed.

Martin v. Ward, 60 Ark. 510.
Clark v. Reyburn, 8 Wallace 318.
Bigler v. Waller, 14 Wallace 297.
Howell v. Western R. R. Co., 94 U. S. 463.
Shillaber v. Robinson, 97 U. S. 68.
C. & V. R. R. Co. v. Forsdick, 106 U. S. 47, 71-72.
2 Jones on Mortgages, Secs. 1563, 1565, 1573, 1586, and 1038-1046.

In State v. Bailey, 27 Ark. 473, the court decided that a court of chancery has no jurisdiction of a bill brought *in rem* against land to foreclose a mortgage given on it, and that such jurisdiction can be conferred only by a statute so providing.

Gregg, Judge, delivering the opinion in that case, said:

"There are certain well fixed rules to which every proceeding in chancery must conform, and among them is the rule, never departed from to my knowledge, that a suit in chancery must be a proceeding *in personam*. Certainly a court of chancery may, as incident to a suit brought, lay hold of property and hold it subject to the final result of the suit, but can, according to the rules of equity jurisprudence, never proceed directly against property as a party to the suit."

27 Ark., p. 477.

In Pardee v. Aldridge, 189 U. S. 429, it was held that a suit to foreclosure a mortgage is not a proceeding *in rem* which will bind persons who are not parties thereto, and the fact that the decree covered the property in question does not conclude strangers to the suit. In replying to the position taken in that case, that the proceeding was *in rem*, and that the decree brought the property into the custody of the court so as to invalidate a sale without the leave of the court, which had been made, Justice Holmes said: "But a suit in equity is not a proceeding *in rem*, properly so called. It does not purport to summon, or invite, by notice, or otherwise, all the world to come in, so far as there are any adverse interests. It is more personal even than the common law, and works out its decrees by orders to the defendants. Of course, the adjudication in such a suit does not conclude strangers."

189 U. S. 433.

And see Gardner v. Ogden, 22 New York, 332-339.

In Bardwell v. Collins, 44 Minn. 97, the statute of Minnesota providing for the service of summons in actions for the foreclosure of real estate mortgages, applicable also to actions to enforce mechanics' liens, was involved. That action was to enforce a mechanic's lien. The complaint alleged that Collins, the defendant, claimed a lien on the interest in the property on which the lien was sought to be enforced, but it was subsequent and inferior to the lien of Bardwell, the plaintiff, and that no personal claim was made against Collins. It nowhere appeared whether Collins was, or was not, a resident of the State. The court presumed he was a resident, and could have been found within the jurisdiction of the court.

The only service of the summons upon Collins was by publication, and no affidavit for publication was ever filed with the clerk of the court, as provided by the general statute. Judgment was entered against Collins by default, and he moved to set it aside on the ground that the court had never acquired jurisdiction of his person, as

there had been no valid service of the summons on him. His motion was refused, and he appealed.

The Supreme Court held that the service of the summons on Collins by publication in a newspaper was not due process of law, and was void, and that "any statute assuming to authorize it was unconstitutional."

The court said it would be of little use to cite authorities upon the subject, which had been fully discussed, but referred to Brown v. The Board of Levee Directors, 50 Miss. 468, as a case in point.

This last case announces the doctrine that the provision to be found in all the State Constitutions, and also in the Fourteenth Amendment to the Constitution of the United States, "that no person shall be deprived of life, liberty or property, except by due process of law," inhibits the Legislature "from dispensing with personal service, where it is practicable, and has been usual under the general law."

50 Mississippi, p. 481, etc.

In its opinion the court below, after stating (record, pp. 82-83) that the act of the General Assembly provides for notice of the pendency of the suit for the enforcement of the collection of the levee taxes, to non-resident owners, by publicatin in some newspaper, and that such notice, in similar cases, has uniformly been held reasonable, said: "The law of which they (owners) are bound to take notice advises them that their lands in the Levee District are subject to taxation for levee purposes, and of the times and places when and where they will be assessed, and taxes levied thereon; when these taxes shall be paid, and, if not paid, suits will be instituted in certain courts to enforce the collection thereof by sale, and that notice of the pendency of the suit would be given them by publication in a newspaper published in the county wherein the lands lie. The law warns them (non-

resident owners) of the necessity of being vigilant, and gives them the information by which they can protect their property against sales."

Then immediately, in deciding the case against Josephine W. Ballard, who had not been made a defendant to the suit to enforce the collection of the levee taxes, and saying that fact did not affect the decree in the suit, or the sale, the court added: "The act provides that such suit and decree shall be in the nature of proceedings *in rem*, and that 'it shall be immaterial that the ownership of the lands may be incorrectly alleged in said proceedings.'" (Record, p. 83.)

We deny that A. B. Ballard and Josephine W. Ballard, non-residents of the State of Arkansas, and citizens and residents, respectively, of the States of Florida and Georgia, were bound to take notice of Act No. 19 of the Acts of the General Assembly of the year 1893, or Act No. 71 of the year 1895, or of the suit brought under those acts, or the proceedings had in the suit.

They were entitled to notice of the acts of the Legislature, and of what was done under them, and, more particularly, of the suit brought to enforce the collection of the levee taxes. It was, in substance, conceded in Carson v. The St. Francis Levee District, 59 Ark. 535-536, that the land owners, under the acts of the Legislature, were not to be given any notice of the time and place when and where their lands would be assessed, and the levee taxes levied thereon. It is manifest, from reading the legislation itself, that no such notice was provided. The court put its decision dispensing with the notice of the assessment, or the levy of the levee taxes, on the ground that a notice and an opportunity to make defense was provided for, to the owners of the lands, of the suit authorized in section 11 of the Act of 1893. The substance of the provisions of that section is contained in the Act of 1895, which has taken its place, and which has prescribed a notice in words, and has thereby afforded the land owners

an opportunity of making a qualified defense against the assessments, or rather of defending the suit brought to recover the levee taxes.

It cannot be claimed upon the present record that A. B. Ballard and Josephine W. Ballard ever had any notice of anything done with reference to their lands under the two acts of the General Assembly, charging the levee taxes, unless they had the notice of the present suit directed in Act No. 71 of the Acts of 1895. Whether notice was given them under that act, of the suit, will be discussed in another place.

All the legislation having reference to the St. Francis Levee District is local and special only. The first act, No. 19, of the Acts of 1893 (Acts of 1893, p. 24), as amended by Act No. 75 of the same session (Acts of 1893, p. 119), and all other acts, apply only to the St. Francis Basin, and embrace the territory between the Mississippi River, on the east, and the high water line along the base, or slope, of the highlands west of the St. Francis River, on the West. The north boundary is the south line of the State of Missouri. The south boundary is the left bank of the St. Francis River at its confluence with the Mississippi River, and then the south line of Lee County west from its intersection with the left bank until it reaches the high water line along the highlands on the west.

The territory embraced constitutes portions only of Phillips, Lee, St. Francis, Cross, Poinsett and Craighead counties, and all of only Crittenden and Mississippi counties. The acts created a Board of Directors, and named the original members of it, and empowered that board to levee "the St. Francis front in this State (Arkansas), and to protect and maintain the same * * * by building, rebuilding, repairing and raising levees on the right bank of the Mississippi River, or such other places as the said board may select," and for that purpose, and in the method prescribed in the act, to make assessments on

the lands in the Levee District, and levy taxes on such assessments, and collect moneys arising therefrom, and use them in doing the required work.

We do not insist that A. B. Ballard and Josephine W. Ballard were necessarily entitled to the service of a personal notice of the existence of the legislation, or of the assessments on their lands for levee taxes, or of the levy of the taxes, nor even of the suit brought to enforce the collection of the taxes. We admit that, being non-residents of the State of Arkansas, they could have been brought before the court by the publication of notice, or the constructive service of process, if there had been statutes providing for such notice, or such service, and the statutes had been substantially pursued. But they were entitled to have the law complied with, and if it has not been complied with, what has been done towards the sale of their lands is void as to them.

This court said, in Earle v. McVeigh, 91 U. S. 508: "Doubtless constructive notice may be sufficient in certain cases, but it can only be admissible in cases coming fairly within the provisions of the statute, authorizing courts to make orders of publication, and providing that the publication, when made, shall authorize the court to decide and decree."

And see:

Hunt v. Wickliffe, 2 Peters, 201, 214-215.
Hollingsworth v. Barbour, 4 Peters, 466, 472, etc.
Galpin v. Page, 18 Wallace, 351, 369.
Guaranty Trust Co. v. Green Cove R. R., 139 U. S. 143, etc.
Roller v. Holly, 176 U. S. 398, 406, etc.

Act No. 19 of the Acts of the year 1893, and Act No. 71 of the Acts of the year 1895, belong to the class usually designated as private statutes, or local statutes, as distinguished from public statutes, or general laws, and the Supreme Court of Arkansas sustained their constitutionality, on the ground that they had been passed under the

permission of Section 25, Article 5, of the Constitution of 1874, which provides negatively:

"That in all cases where a general law can be made applicable, no special law shall be enacted."

Carson v. St. Francis Levee Dist., 59 Ark. 513.

They have not the same effect as public laws or general statutes have.

Chancellor Kent says there is a material distinction between such statutes as the acts here in question, and public statutes, and that a private statute operates on a particular thing, or private person, and does not bind or include strangers in interest to its provisions, and such strangers are not bound to take notice of such act, even though there be no general saving clause of the rights of third persons.

This construction, he says, is supported by the opinion of Sir Matthew Hale, in Lucy v. Levington, 1 Ventris 175, where it is laid down that, though every man be so far a party to a private Act of Parliament as not to gainsay it, yet he is not so far a party as to give up his interest.

1 Kent's Commentaries, *pp. 459-460.

And see:

Potter's Dwarris on Statutes, Chap. 2, pp. 52-57.
Sedgwick on Statutory and Constitutional Law, Chap. 2, *pp. 30-36.
Jackson v. Catlin, 2 Johnson (N. Y.) 263, and 8 Johnson (N. Y.) 520.
McKinnon v. Bliss, 21 N. Y. 206.
Cook v. S. S. Mfg. Co., 1 Sneed (Tenn.), 698, 715-716.
King v. Doolittle, 1 Head (Tenn.) 77.
Miller v. Johnson, 71 Ark. 174.
2 Pomeroy's Eq. J., Sec. 849.
Elmendorf v. Carmichael, 3 Little (Ky.), 475, and 14 Am. Dec. 86.
1 Greenleaf's Evidence, Secs. 480-481.
Leland v. Wilkinson, 6 Peters 317.
Cooley's Constitutional Limitations (6th Edn.), Chap. 5, p. 115.

We do not deny that the State of Arkansas had the power to enact the legislation providing for the assessment and collection of the levee taxes on the lands embraced in the two acts of the General Assembly, and also the power to make the taxes assessed liens on the lands, and, in order to collect the taxes, to provide by legislation for the bringing and prosecution of the special suit in the Chancery Court authorized by the two acts. We concede, too, that the State had the power to provide, by legislation, for the bringing of the lands assessed for taxation and the owners of them, with respect to those lands, before one of its courts as defendants to the suit authorized, by publication of notice, or by substituted service of process, where the owners of the land could not be personally served with process within the State.

See Roller v. Holly, 176 U. S. 398, 402-407.

But the State, as against A. B. Ballard and Josephine W. Ballard, who were citizens of Florida and Georgia, respectively, and resided in those States, and owned the lands in question here, located in Crittenden County, Arkansas, could not authorize the special suit provided for in the two acts of its General Assembly, until those lands were substantially brought under the control of the court, in the suit, in the manner prescribed in its legislation, and could not, in the suit, with respect to those lands, dispense with notice to A. B. Ballard and Josephine W. Ballard, the owners of the institution, or pendency, or object of the suit; or how or when they should appear and make defense, and bind them by the decrees or proceedings in the suit.

Hart v. Sansom, 110 U. S. 151.
Woodruff v. Taylor, 20 Vermont 65.
Brown v. The Board of Levee Commissioners, 50 Miss. 469.
Bardwell v. Collins, 44 Minn. 97.
Smith v. Hurd, 50 Minn. 503.
Dull v. Blackman, 169 U. S. 243.

It was thoroughly settled by the decisions under the acts of Congress providing for the confiscation of the

property of persons engaged in the late rebellion against the government of the United States, that the district courts of the United States acquired no possession of, and no jurisdiction for, the condemnation of property forfeited, and no power to make any order with reference to such property, or fix a lien upon it, encumbering the title, or sufficient to bind the title, until the property was actually seized, or fixed specially under the process authorized by the statute to be issued, for the purpose.

Miller v. The United States, 11 Wallace, 268, 294, 296.
Pelham v. Way, 15 Wallace 196, 201-202.
Pike v. Wassell, 94 U. S. 711.

Our contention is that under Act No. 71 of the Acts of 1895, the jurisdiction and authority of the Circuit or Chancery Court to decree sales of the lands proceeded against, in the suit provided for, to collect the levee taxes, were expressly limited and confined to cases where the notice prescribed in that act had been properly given, as directed in the act, and where no answer had been filed, or, if an answer had been filed, then to cases where the decision of the court, on the final hearing as to the person answering, or the land embraced in the answer, was in favor of the St. Francis Levee District, and against such owner, or his land, and that the fact of the notice having been given, as required, must be established as a condition precedent in order to fix the lien on the land, or authorize the decree of sale.

Acts of 1895, pp. 89, 91.

In Gregory v. Bartlett, 55 Ark. 30, the court said, in discussing the overdue tax act in question there (Acts of Arkansas of 1881, No. 39, p. 63), which in the particular now being considered does not differ in substance from Act No. 71 of the year 1895, in question here: "We are not embarrassed by the consideration of the question whether jurisdiction to sell may not be acquired by seiz-

ure of the lands without other notice, as was indicated in Field v. Dortch, 34 Ark. 399.

Under the act in question, no actual seizure is contemplated, and there is nothing for the jurisdiction of the court to rest upon, except the notice by publication.

McCarter v. Neil, 50 Ark. 188.

Without the statutory notice, therefore, there can be no jurisdiction. If the clerk makes the warning order, as the second section of the act requires, but fails to publish or post it, and that fact appears in the judgment record, there could be no justifiable pretense of jurisdiction."

55 Ark., p. 33.

This ruling was followed by this court in Dick v. Foraker, 155 U. S. 404, where a large portion of the opinion in Gregory v. Bartlett was copied and approved, including the portion we have copied, and the further statement: "No process was ever issued in the cause in which the challenged decree was rendered. The court's determination of any question was, therefore, *coram non judice*, and binding upon no one."

155 U. S., p. 413.

In Galpin v. Page, 18 Wallace 366, after a very full examination of the principles applicable, and stating a number of propositions which have become axioms, this court said: "The extent of the special jurisdiction, and the conditions of its exercise over subjects or persons, necessarily depend upon the terms in which the jurisdiction is granted, and *not* upon the rank of the court upon which it is conferred. Such jurisdiction is not, therefore, the less to be strictly pursued, because the same court may possess over other subjects, or other persons, a more extended and general jurisdiction."

It then stated that the party in the case before it was shown in the record to have been beyond the reach of the

process of the court; that is, a non-resident of the State, and said: "All presumption of jurisdiction over her person by the district court, which otherwise might have been indulged, is thus repelled, and it remains for the defendant to show that by the means provided by statute such jurisdiction was obtained."

18 Wallace 372.

After the statement last quoted, the court stated that the statute in question required the order of the court, or a judge, before the publication of notice to an absent and non-resident defendant could be made, and prescribed the facts which were required to exist to authorize the order, and also the manner in which the facts were to be made to appear, the period for which the publication was to be made, and the mode in which the publication was to be established, and then said:

"These provisions, as already stated, must be strictly pursued, for the statute is in derogation of the common law. And the order which is the sole authority for the publication, and which, by statute, must prescribe the period, and designate the paper in which the publication is to be made, should appear in the record, with proof of compliance with its directions, unless its absence is supplied by proper averment. If there is any different course of decision in the State, it could hardly be expected that it would be followed by a Federal Court, so as to cut off the right of a citizen of another State from showing that the provisions of the law by which the judgment has been obtained against him have never been pursued."

18 Wallace 372-373.

In Noble v. Union River Logging R. R., 147 U. S. 165, the court took the distinction between cases where the jurisdictional facts do not exist, and cases presenting the absence of facts *quasi* jurisdictional, or jurisdictional only in a qualified sense.

In the first class, the judgments or decrees are void. In the second class, erroneous, or voidable only.

As an example of this last class, Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552, was referred to. The court classed as cases presenting *quasi* jurisdictional facts, such as present facts "which are necessary to be alleged and proved, in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally."

It said: "With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties."

147 U. S. 172-175.

And see what Dallas, Judge, said in Eltonhead v. Allen, 119 Fed. Rep. 127.

Scott v. Pleasants, 21 Ark. 364.
Bloom v. Burdick, 1 Hill (N. Y.) 138-143.
Wright v. Douglass, 10 Barbour (N. Y.) 110-111.

The court in Gregory v. Bartlett, 55 Ark., p. 35, distinguished Scott v. Pleasants from the case before it.

The same distinction in substance had been taken in Elliott v. Piersol, 1 Peters 328. There the court said:

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification, and all persons concerned in exe-

cuting such judgments or sentences are considered in law as trespassers."

And further: "This distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court, exercising authority over a subject, may be inquired into in every other court, when the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceedings."

1 Peters 340-341.

In Williamson v. Berry, 8 Howard 495, the court said: "We concur that neither orders nor decrees in chancery can be reviewed as a whole in a collateral way. But it is an equally well settled rule in jurisprudence that the jurisdiction of any court, exercising any authority over a subject, may be inquired into in every other court, when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a Court of Admiralty, Chancery, Ecclesiastical Court, or Court of Common Law, or whether the point has arisen under the laws of nations, the practice in Chancery, or the municipal laws of States."

8 Howard 540-541.

Ater referring to the older cases, the court said further: "The operation of every judgment depends upon the jurisdiction of the court to render it. Though there may be jurisdiction for certain purposes in a cause, that jurisdiction may be exceeded in the judgment. And whenever the right to property is claimed to have been changed under a judgment or decree by a court, and it is set up as a defense in another court, the jurisdiction of the former may be inquired into.

The rule is that where a limited tribunal takes upon itself to exercise jurisdiction which does not belong to

it, its decision amounts to nothing and does not create a necessity for an appeal. Attorney General v. Lord Hotham, Turner & Russell, 219."

8 Howard 543.
And see Windsor v. McVeigh, 93 U. S. 282-284.

In Guaranty Trust Co. v. Green Cove R. R., 139 U. S. 137, after referring to Cooper v. Reynolds, 10 Wallace 108, and explaining it, and quoting a part of what we have quoted from Williamson v. Berry, the court said: "The decisions of this court upon this subject, beginning in the year 1794, with the case of Betsy, 3 Dallas, p. 6, have been consistent and uniform."

139 U. S. 146-147.

Cooper v. Reynolds, and Ludlow v. Ramsey, 11 Wallace 581, which followed it, arose in Tennessee, and each involved the validity of a sale under a judgment in a suit, in a court of that State, where there was no personal service, or appearance, but an *ancillary* writ of attachment was sued out, and levied on land. The land was sold under the judgment in the suit, and title was claimed by the purchaser under the sale. The effect of the judgment and the sale under it manifestly was a matter of State law. By the law of the State a defendant whose property was attached under an *ancillary* attachment could not be brought before the court by the publication of a notice, and such a notice as to such a defendant was simply void. It was also the established law that a writ of attachment, sued out upon an affidavit which did not contain the facts required in the statute prescribing the affidavit, was not a sufficient basis for the order of publication, and that a judgment of sale, rendered in a case where the affidavit was insufficient, was simply void. The sales of the lands in Tennessee were wholly worthless, and yet, in each case, the sale was sustained, the judgment of the Circuit Court of the United States being reversed. This was the result of the court mistaking the law of

Tennessee (10 Wallace 320-321 and 11 Wallace 588), as the following cases and many others show:

Maples v. Tunis, 11 Humphreys 108.
Ingle v. McCurry, 1 Heiskell 26.
Maxwell v. Lea, 6 Heiskell 247.
Walker v. Cottrell, 6 Baxter 257, 264-270.
Bains v. Perry, 1 Lea 37.
Haynes v. Powell, 1 Lea 347.
Byram v. McDowell, 15 Lea 381.

In Pennoyer v. Neff, Justice Field, who had dissented in Cooper v. Reynolds, referred to that case, and stated what it was (95 U. S. 724-726), and then quoted that portion of the opinion delivered by Justice Miller, declaring the effect of a personal action, against an absent party, without the jurisdiction of the court, not served with process, or voluntarily submitting to the tribunal, when it was sought to subject his property to the payment of a demand of a resident plaintiff. He said that the opinion of Justice Miller was a clear statement of the law, as to the efficacy of such actions, and the jurisdiction of the court over them. After the quotation from the opinion of Justice Miller, he said further that, though the defendants in that suit had fled from the State, and were not non-residents, the opinion treated them as without the territorial jurisdiction of the court, and that the grounds and extent of the court's authority over persons and property, thus situated, were considered, when they were not brought within the court's jurisdiction, by personal service, or voluntary appearance.

As already seen in what we have stated above, Cooper v. Reynolds, treated the lands of the defendant in the suit as having been lawfully attached for the purposes of the suit, and therefore within the jurisdiction of the court in the suit (Field v. Dortch, 34 Ark. 399), and the notice by publication to the defendant in the suit as having been lawfully made, and being only a step in the suit, and upon this basis, what Justice Miller said as copied, was rested, as was also the concurrence of Justice Field in the statement quoted.

Justice Field said, finally, that in Cooper v. Reynolds, he considered some of the objections to the preliminary proceedings in the attachment well taken, and dissented from the judgment of the court, but to the doctrine as declared in what he copied, he and the other judges agreed.

95 U. S. 726.

See Voorhees v. Bank of U. S., 10 Peters 449, and Applegate v. Lexington v. Carter County Mining Co., 117 U. S. 255, on the necessity of the court's having possession of the property proceeded against.

We fully recognize the difference between such cases as Boswell v. Otis, 9 Howard 336; Bischoff v. Wethered, 9 Wallace 812, Hart v. Sansom, 110 U. S. 151, and Dull v. Blackman, 169 U. S. 243, on the one side, and Arndt v. Griggs, 134 U. S. 316; Lynch v. Murphy, 161 U. S. 247, and Leigh v. Green, 193 U. S. 89, on the other, though it is difficult in many cases to apply the distinction.

Referring to Hart v. Sansom, and Arndt v. Griggs, the court said, in Roller v. Holly, 176 U. S. 405: "The substance of these cases is that if the plaintiff be in possession, or have a lien upon land within a certain State, he may institute proceedings against non-residents to foreclose such lien, or to remove a cloud from his title to the land, and may call them in by personal service outside of the jurisdiction of the court, or by publication, if this method be sanctioned by the local law."

McLaughlin v. McCrory, 55 Ark. 442, was based on Hart v. Sansom, and Arndt v. Griggs. It only decided that a court of equity in Arkansas, under its statutes, may bring non-residents before it by publication of notice, in order to adjudicate and quiet the titles to lands locally there, and, in such cases, may, by its decrees, operate upon the lands substantially *in rem*. Ormsby v. Ottman, 85 Fed. Rep. 492, is to the same effect. Leigh v.

Green involved the collection of the State's ordinary public taxes, and was where the State authorized the sale of land for such taxes upon proceedings to enforce a lien for the payment of them, and the owner was unknown, and the court held that the State might proceed directly against the land within its jurisdiction, or authorize others to do so, upon a notice to all interested. In that case the court said, after referring to a number of cases: "The principles applicable, which may be deduced from the authorities, we think lead to this result: Where the State seeks directly, or by authorization to others, to sell lands for taxes, upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the lands within the jurisdiction of the court, and a notice which permits all interested who are 'so minded,' to ascertain that it is to be subjected to sale, to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law, within the Fourteenth Amendment to the Constitution."

193 U. S. 92-93.

Neither the Act No. 19, of the Acts of 1893, nor the Act No. 71, of the Acts of 1895, nor any other act of the General Assembly, provides for any actual seizure of, or levy upon, the lands charged with the assessments for the levee taxes, in the suit provided for, for the collection of those taxes.

Act No. 71, of the Acts of 1895, prescribes the notice to be given the owners of the lands, and the form of the notice, and, as a condition of the decree to be rendered in the suit, for the sale of the lands proceeded against, provides: "And in all cases where *notice has been properly given*, as aforesaid, and where no answer has been filed, or, if filed, and the cause decided for the plaintiff, the court, by its decree, shall grant the relief as prayed in the complaint and shall direct said commissioner to sell the lands described in the decree."

Acts of 1895, p. 91.

The general statute provides (Sandels & Hill's Digest, Sec. 5886, Kirby's Digest, Sec. 6263): "No lien on the property of the defendant constructively summoned shall be created otherwise than by an attachment, as provided in Chap. 9, Attachments, or by judgment."

Another statute provides: "No personal judgment shall be rendered against a defendant constructively summoned, or summoned out of this State, as provided in Section 5677, and who has not appeared in the action." (Sandels & Hill's Digest, Sec. 5887, Kirby Digest, Sec. 6264.) No attachment in the suit for the levee taxes was issued, or was levied, on the lands of A. B. Ballard and Josephine W. Ballard. Substantially, therefore, the statute has made the proceedings in the suit authorized, and the efficacy of the lien declared upon the land proceeded against, to depend upon the validity of the assessment of the levee taxes, and the fact of the notice having been properly given in the suit, as required, and the decree of sale having been properly made in the suit based on such notice. (Heine v. The Levee Commissioners, 19 Wallace 655, 659.) The making of the assessment of the levee taxes a lien in the nature of a mortgage on the land (Sec. 10, Acts of 1893, p. 30), and the foreclosing of that lien, so as to give the effect of a mortgage (Acts of 1895, Sec. 2, p. 92), only emphasized the necessity for notice to the owner of the land proceeded against.

It was not intended in the statute that the name of any owner of lands, or any one having an interest in the lands proceeded against, should appear in the list of the defendants. But the names of such persons were to be included in the body of the notice, and were to be indicated by being written or printed opposite his or her or its lands in the subjoined list of lands embodied in the notice. (Acts of 1895, pp. 89-90.) Thus, the owner or person interested, when he saw the notice, could have no difficulty in determining what lands he, or she, or it, owned, or was inter-

ested in, or the purpose for which he, she, or it, was brought before the court in the suit.

See Brodie v. Skelton, 11 Ark. 120.

The General Assembly having prescribed the form, its command was peremptory, and neither the Board of Directors of the St. Francis Levee District, nor the clerk of the court in which the suit was brought, nor the court itself, had any authority to deviate from such form in giving the required notice. If the form was not allowed, the notice was not given as provided for in the statute. No liberality of interpretation or construction can be resorted to as to statutes providing for the bringing before the court, in a suit specially authorized, of the persons whose interests may be disposed of in the suit, and who cannot be given notice of such suit, personally.

In this case the designation of the defendants as "Delinquent Lands" would have been much more likely to attract the attention, and suggest the possible interest of A. B. Ballard and Josephine W. Ballard, or those to whom the notice was directed, having lands in Crittenden County, as a suit they might have an interest in, or be concerned with, than the designation of the defendants to the suit by name, as "The Memphis Land and Timber Company and others," thereby indicating merely that particular corporations, or particular persons, were concerned, and that the suit was simply a personal suit, between the plaintiff on the one side and the defendants named on the other. The cloaking of the object of the suit was contributed to by omitting any mention of "Delinquent Lands," the term used in the statute, as representing all the persons and corporations owning the lands, or having interests in them, and simply naming some, or all of those persons or corporations.

A. B. Ballard and Josephine W. Ballard had no connection with the Memphis Land and Timber Company, and nothing was contained in the caption of the complaint

stating the names of the defendants (Record, pp. 9-11), or in any notice, if following the statutory form (Acts of 1895, pp. 91-92), as given or published in that case, connecting them, or their lands, with any of the persons or corporations, or suggesting or tending to suggest to A. B. Ballard or Josephine W. Ballard an investigation as to what the notice referred to, or what the object of the suit was. The decree of the 14th of February, 1898, in the suit, ordering the sale of the lands of A. B. Ballard and Josephine W. Ballard (Record, p. 16) shows that the Memphis Land and Timber Company, the first defendant named in the complaint, and in the decree, and probably the only defendant named in the caption of the notice of the suit in the newspaper, if any notice, or warning order, was in fact published, did appear in the suit and did make defense. If A. B. Ballard and Josephine W. Ballard had been named, they probably would have done the same thing, or, at least, might have done the same thing, as their attention, or the attention of some one knowing or concerned in them, might have been attracted to the notice. It may well be said that the notice, if published in the suit as styled, as the style appears in the record, was misleading, and may have prevented or deterred A. B. Ballard and Josephine W. Ballard from being informed of, or learning, the fact of the pendency of the suit, or the fact that they were concerned in the suit, or that their lands were involved, when a notice given in the form prescribed by the statute might have brought to them the information necessary. See the case of Marx v. Hanthorn, 148 U. S. 172, where the doctrine that an incorrect notice is misleading was applied, and the notice was held to be invalid.

See 148 U. S. 183-184.

The number of defendants indicated by the complaint and the decree, and the fact that all the lands subject to levee taxes in Crittenden County—possibly several thousand distinct tracts—may have been proceeded against

in the one suit, sufficiently indicate the extent and magnitude of the notice, and the utter improbability of its attracting the attention of A. B. Ballard and Josephine W. Ballard, the one in Florida and the other in Georgia, when published only in a weekly country newspaper, such as was published at the time in Crittenden County, and the name of one was not mentioned at all, and the name of the other was included among more than two hundred other names.

In Brodie v. Skelton, 11 Ark. 120, the statute required only that the order published to non-resident defendants state in general terms the nature of the complaint. The object of the bill filed, as set forth in the order published, was to correct a mistake in a deed of trust, and also to appoint a new trustee, but the scope and purpose of the bill was, not only to correct the mistake and appoint the trustee, but also to divest titles and correct deeds, and thus vitally to affect the rights not appearing in the order published.

The court said: "If their rights were sought to be thus vitally affected, there can be no doubt but that they were entitled to be apprised of it, so that they could be prepared to make their defense, and, if possible, prevent so great a calamity. The object of the bill, as set forth in the order, was well calculated to mislead and lull them into a false security, and, consequently, could not be sufficient to meet the requirements, and answer the end of the law."

11 Ark., p. 130.

And see Saffold v. Saffold, 14 Ark. 408, 409-411.

The provisions of the statutes, Acts of 1893, No. 19, and 1895, No. 71, and all the others on the same subject, as to the method of procedure and notice, and other like matters, are mandatory, and must be shown in this suit to have been observed technically and literally, as well as substantially, as a condition precedent to the attachment

of the lien on the lands of A. B. Ballard and Josephine W. Ballard, and the other lands assessed, and to the power to decree a sale of such lands for the payment of the levee taxes sued for, and to the right to have the lands sold for the taxes, and if the requirements of the statutes have not been so observed, the sales of the lands of A. B. Ballard and Josephine W. Ballard are, for that reason alone, void.

Patrick v. Davis, 15 Ark. 370-371.
Wiley v. Flournoy, 30 Ark. 612.
Matter of Will of Cornelius, 14 Ark. 682.
Abraham v. Wilkins, 17 Ark. 319-320.
Rector v. Board of Improvement, 50 Ark. 116.
Watkins v. Griffith, 59 Ark. 344.
Torrey v. Millbury, 21 Pickering 640.
Sandwich v. Fish, 2 Gray (Mass.) 298, 301.
Clark v. Crane, 5 Michigan 154.
French v. Edwards, 13 Wallace 506, 511.
Lyon v. Alley, 130 U. S. 178, 184, etc.
Gregory v. Bartlett, 55 Ark. 30.

And see Heine v. Levee Commissioners, for a decision of the question when taxes become liens.

19 Wallace 655.

The record of this suit wholly fails to show that any notice whatever was given to A. B. Ballard or Josephine W. Ballard, or to anybody, of the pendency of the suit in which the lands in controversy were sold for the levee taxes.

No notice, or warning order, appears in the record, and no order appears there directing the giving of any notice, or the publication of any warning order. The clerk of the Chancery Court of Crittenden County appended a certificate of the record, as it went up to the Supreme Court, that the pages he sent up, and to which he attached his certificate, contained a true and complete transcript of the records, proceedings and papers in the case of the Board of Directors of the St. Francis Levee District v. The

Memphis Land and Timber Company, and others, and in the matter of the controversy between A. B. Ballard and others, and A. Hackler and others, as therein set forth, and as the same appeared of record and on file in his office. (Record, pp. 78-79.)

Under the established law of Arkansas, the record is complete, and the court cannot go outside the record for facts, but must determine the case upon the facts in the record.

Stayton v. Newcomer, 6 Ark. 451.
Merrick v. Kimball, 20 Ark. 12.
Memphis Land and Timber Co. v. The Board of Directors of the St. Francis Levee District, 70 Ark. 409.
Gregory v. Bartlett, 55 Ark. 30.

In the Crittenden Chancery Court, under the stipulation of the parties, the cause was presented and heard as an agreed case, upon an agreed statement of facts filed in the cause, and the evidence referred to in that agreement. (The word "appeal" is used in place of the word "agreed" in the stipulation as copied in the Minute Book.) (Record, pp. 37, 38.) Under the agreement as made (Record, p. 40), the original complaint and all amendments, the warning order, or order of publication, the proof of the publication, the summons or other process issued, and the returns on all process, the publications of warning orders, or notices made in the newspaper, and the pleadings and proceedings in the suit, including all the orders, judgments and decrees, and any and all reports of sales and deeds made by the commissioner, having reference to the lands of A. B. Ballard and Josephine W. Ballard, were parts of the record for the purposes of the present controversy, subject only to objections for irrelevancy and incompetency, and either party had the right, if the original record, process, pleading, proof, proceeding, or other paper, or record, could not be found, to use in evidence, in the place of the original, true copies thereof, with the like effect.

Our claim is that the record of this suit must show notice affirmatively, given according to the statute, to A. B. Ballard and Josephine W. Ballard, or the conclusion follows that no notice was given. But, waiving this position for the present, this record shows affirmatively that no such notice as that required by Act No. 71, of the Acts of 1895, could have been given in this case. That act declares that notice of the pendency of the suit shall be given as against non-residents of the county, when the suit is pending, by publication weekly, for four weeks prior to the day on which final judgment may be entered, for the sale of the land, in some newspaper published in the county, and then says, "which public notice may be in the following form." Under the law applicable in this class of cases, the meaning of the statute is that the notice "shall be in the following form," and no departure from the form is admissible.

Rex and Regina v. Barlow, 2 Salkeld 609.
Mason v. Fearson, 9 Howard 248, 258-260.
Potter's Dwarris on Statutes and Constitutions, p. 220.
Newburgh T. P. Co. v. Miller, 5 Johnson's Ch. 113.
Malcolm v. Rodgers, 5 Cowen, 193.
Gregory v. Bartlett, 55 Ark. 34.

The statute not only made the substance of the notice a part of the form prescribed, but actually prescribed the style of the suit in which the notice should be given, and did so in these words:

"St. Francis Levee District
v. Notice.
Delinquent Lands."
Acts of 1895, p. 89.

The style of the case, therefore, as well as the contents of the notice, has been made statutory.

The notice, as prescribed in the statute (Acts of 1895, pp. 89-90), did not mention the term of the court at which the persons notified were required to appear and make

defense, nor state the time within which they were required to appear and make defense, but did state that the suit was pending in the Circuit (Chancery) Court of—— County, Ark. Below the form of the notice in the statute and on the same page it was provided that the suit should stand for trial *at the first term* of the court after the complaint had been filed, if four weeks in the case of a non-resident or unknown defendant, or twenty days in the case of a resident defendant, expired either before the first day of the term, or during the term to which the suit had been brought, unless a continuance was granted; and on the preceding page, in prescribing the notice, the statute declared that it should be by publication weekly, in some newspaper published in the county, for four weeks prior to the day of the term of court on which final judgment might be entered for the sale of the land. And the statute required the court, in all cases where the notice had been properly given (p. 91) and no answer had been filed, or if filed and the cause had been decided for the plaintiff, by its decree to grant the relief prayed by the complaint, and to direct the sale of the land.

The third Monday of January, 1898, which was the first day of the January term, 1898, of the Crittenden Chancery Court (Acts of Arkansas of 1897, Extra Session, p. 90), was the 17th day of January, 1898. The complaint was filed on the 21st day of December, 1897 (Record p. 14). Between those dates there were twenty-seven days. The same chancellor who held the Chancery Court of Crittenden County also held the Chancery Court, at prescribed times, regularly, in ten other counties, twice a year. The Chancery Court of Mississippi County, immediately preceding that of Crittenden, was held on the first Mondays in January and July of each year. The Chancery Court of Cross County, immediately following that of Crittenden, was held on the first Mondays in February and August of each year. The other counties of the Chancery District followed Cross in regular order (Acts of Arkansas of 1897, Extra Session,

p. 93). Giving the term of the Chancery Court of Crittenden County the two weeks allowed by law, it terminated on the 29th day of January, 1898. The decree of sale in this case was not rendered during that term, but on the 14th day of February, 1898 (Record p. 14), which was during the second week of the February term, 1898, of the Cross County Chancery Court, as fixed by law.

Nothing in the record shows that there had been any appearance in the suit during the January term, 1898, of the Crittenden Chancery Court, nor any order of the court postponing or continuing the case beyond the January term, or until the 14th day of February, 1898, or any order fixing that day for the holding of a special term of the court.

The general statute provides: "Special adjourned sessions of any court may be held in continuation of the original term upon its being so ordered by the court or the judge in term time, and entered by the clerk on the record of the court." Sandel's & Hill's Digest, Sec. 1307; Kirby's Digest, Sec. 1531. Under this statute it has been held to be essential to the jurisdiction of the court, sitting upon an adjournment, that the entry by the clerk on the record of the court of the order of the court, the order of the judge making the adjournment be, in fact, made.

Dunn v. The State, 2 Ark. 229, 252, etc.
Pulaski County v. Lincoln, 9 Ark. 320, 326, etc.
Galbreath v. Mitchell, 32 Ark. 278.
Crain v. The State, 45 Ark. 450, 453, etc.
State v. Williams, 48 Ark. 228.

It has frequently been held also that a court held at any time, or at any place, not authorized by law, can exercise no lawful jurisdiction, and that its proceedings and judgments are simply void.

Lawson v. Pulaski County, 2 Ark. 15.
Brumley v. The State, 20 Ark. 77.

Osborn, *ex parte*, 24 Ark. 479.
Chaplain v. Holmes, 27 Ark. 417.
Graham v. Parham, 32 Ark. 687.
Grimmett v. Askew, 48 Ark. 155.
State v. Williams, 48 Ark. 227.
Jones, *ex parte*, 49 Ark. 110.
Parr v. Matthews, 50 Ark. 390.
Street v. Reynolds, 63 Ark. 4.
Ex parte Williams, 69 Ark. 459.
Berger v. Lutterloh, 69 Ark. 576.
Caldwell v. Barrett, 71 Ark. 310.

The statute prescribed that the suit for the levee taxes should stand for trial as to non-resident defendants at the first term of the court after the complaint was filed, if the four weeks of publication of the notice had expired. The complaint, as we have seen, was filed on the 21st day of December, 1897. The third Monday of January, 1898, the 17th day of that month, was the beginning of the next term of the Chancery Court of Crittenden County in which the suit was brought. The four weeks of publication of the notice expired in the first week. That term endedby law on the first Monday in February, which was the beginning of the term of the Chancery Court of Cross County. It ended, therefore, before the 14th day of Februaw, 1898, the day on which the decree of sale was entered. The notice, therefore, if published under the statute taken in connection with the requirements of the statute, was that appearance and defense must be made at the January term, and not only gave no notice to those to whom it was directed that the decree might be entered on the 14th day of February, 1898, but, in effect, gavenotice that no such thing could be done. The notice, therfore, was misleading, and in reality no notice that the decree of sale would be entered *when* it was entered. It was no notice at all of *any time* when the decree would be entered. The decree of sale of the 14th of February, 898, was, therefore, void for want of notice as to A. B Ballard and Josephine W. Ballard.

Aller v. Ozark Land Company, 55 Arks. 549.

Hogins v. Brashears, 13 Arks. 251.
St. Louis & S. F. Ry. Co. v. Holton-Warren L. Co., 61 Arks. 50.
Chaplin v. Holmes, 27 Arks. 417-418.
Parr v. Matthews, 50 Arks. 390.
Grimmett v. Askew, 48 Arks. 151.
Baskins v. Wylds, 39 Arks. 347.

The prayer of the complaint was that the warning order require the defendants to answer at the next January term of the court. (Record p. 13.)

If the Chancery Court of Crittenden County was lawfully adjourned during the January term, 1898, to the 14th day of February, 1898, when the decree of sale was entered, it did not follow that the notice, if given according to the requirements of the statute (Acts of 1895, No. 71), required A. B. Ballard and Josephine W. Ballard to appear on the 14th day of February, 1898, and make defense to the suit against their lands. The law, in such cases, requires a literal and exact compliance. If A. B. Ballard and Josephine W. Ballard were given notice to appear during the January term, 1898, of the Crittenden Chancery Court and make defense, they could not lawfully be required to appear and make defense on the 14th day of February, 1898, and the decree of sale taken against them on that day was without jurisdiction and void.

In Black on Tax Titles, Section 61, it is stated: "Where the statute prescribes that judgments against lands for delinquent taxes shall be rendered at a specified term of the court, this provision is peremptory and not merely directory, and an application and judgment at a different term will not be sustained. A judgment and sale under such circumstances is void."

And Judge Cooley, in his work on Taxation (1st Ed.), Chapter 15, page 361, in specifying the cases in which errors and imperfections have been held to render judi-

cial proceedings in the sales of lands for unpaid taxes void, includes among them "applying for and obtaining judgment at a different term from that at which the statute requires the application to be made."

See Baskins v. Wylds, 39 Ark. 347.

Conceding that A. B. Ballard and Josephine W. Ballard were among those stated in the decree of the 14th of February, 1898, to have been "severally, constructively, summoned by publication in a newspaper" (which certainly is not true as to Josephine W. Ballard), the same decree shows (Record p. 16) that they had failed to appear or make defense, and thus establishes the fact that they did not appear in court in consequence of the notice.

The statute gave no power to the court to adjourn or postpone the hearing beyond the term next after the filing of the complaint where the owners of the lands proceeded against, or those having interests in the lands, did not "appear and make defense."

The court had no power, under the statute, had it undertaken to do so, to make an order at the January term, 1898, obliging A. B. Ballard and Josephine W. Ballard, who did not then appear in the suit, to appear and make defense with respect to their lands on the 14th day of February, 1898, after the January term, 1898, of the court had ended. Hudson v. Jefferson County, 28 Arks. 360; Grimmett v. Askew, 48 Arks. 155. The fact is, it made no such order, and it had not even the color of such an order for requiring appearance and defense on that day, or for entering the decree of sale as against them on that day, because they failed to appear or make defense.

The court below took no notice of the proposition presented and fully argued before it, that notice in the suit

for the levee taxes was required, or the proposition that notice had to be established by the record of the suit, or the proposition that the decree of sale without the notice was a nullity; but assumed, if we understand the opinion (record, pp. 82-83), that A. B. Ballard and Josephine W. Ballard were obliged, without notice—actual or constructive, as a matter of law—to know of the enactment of Act No. 19 of the Acts of 1893, and Act No. 71 of the Acts of 1895, and of the assessment of the levee taxes against their lands under those acts, and of the present suit to recover those taxes, and not having appeared and made defense, the decree of sale concludes them.

It cited as authority only the case of Johnson v. Hunter, 127 Fed. Rep. 219, which, at the time it was cited, was on appeal from the Circuit Court of the United States for Arkansas, to the Circuit Court of Appeals of the United States for the Eighth Circuit, and the decree was reversed by that court, and a decree rendered in favor of the appellants, Johnson and others, in August last. A copy of the opinion will be before this court on the hearing of this cause.

It was argued by the counsel for Hunter and others in the court below, and will no doubt be here, that the recital in the decree of sale (record, p. 16), to the effect that all the defendants, naming A. B. Ballard (but not Josephine W. Ballard) among them, who had been "severally, constructively, summoned by publication in a newspaper, published in Crittenden County, Arkansas, weekly for four weeks before this day, proof of which has been previously filed herein, and all of the above named defendants * * * having failed to plead, answer or demur to the complaint of the plaintiff, the court, on motion of the attorney for the plaintiff, awards a decree *pro confesso* as to them, in favor of the plaintiff, for the amount of the taxes, interest, penalty and costs due for their said lands," establishes notice to A. B. Ballard and Josephine W. Ballard of the suit, and estops them from raising, or

presenting, the question of notice on the hearing of this cause.

We wholly deny the correctness of the proposition.

The court below took no notice of the statute (Sandels & Hill's Digest, Sec, 5882, Kirby's Digest, Sec. 6259), providing that where a judgment has been rendered against a defendant or defendants constructively summoned, and who did not appear, such defendants, or any one or more of them, may at any time within two years—and not thereafter—after the rendition of the judgment, appear in open court and move to have the action retried, and security for the costs being given, such defendant or defendants shall be permitted to make defense. And thereupon the action shall be tried anew as to such defendant or defendants, as if there had been no judgment. And upon the new trial the court may confirm, modify or set aside the former judgment, and may order the plaintiff in the action to restore to any such defendant or defendants any money of such defendant paid to them under such judgment, or any property of such defendants obtained by plaintiff under it, yet remaining in his possesion, and pay to the defendant the value of any property which may have been taken under an attachment in the action, or under the judgment and not restored.

We insist that the statute entitles A. B. Ballard and Josephine W. Ballard to have the action "tried anew as to such a defendant or defendants (them) as if there had been no judgment."

We claim that this present writ of error (as was the appeal to the Supreme Court of Arkansas from the decree of sale of the Crittenden Chancery Court) is in the original suit in which the decree of sale was rendered, and that that suit in its entirety was before the Supreme Court of Arkansas by the appeal, and is before this court

on the writ of error, for adjudication, as to all the rights and remedies of A. B. Ballard and Josephine W. Ballard.

But, treating the writ of error now here as a collateral attack on the decree of the Chancery Court of Crittenden County of the 14th of February, 1898, for the sale of the property of A. B. Ballard and Josephine W. Ballard, it is not true that any fact appears in the record, or that the record contains any recital establishing that that court had jurisdiction to render that decree.

The furthest the decisions of the courts entitled consideration as authority have gone in support of the jurisdiction of courts over the subject matter and parties to suits, is to hold that where the court rendering the judgment or decree is a superior court of record, of general jurisdiction, proceeding in the usual way, according to the ordinary course of courts of law, or courts of chancery in suits before them, and the subject matter is within the jurisdiction of the court, and nothing appears in the record showing a want of jurisdiction over the subject matter, or the parties, then, when the decree or judgment of such court is called in question in another court, there is a presumption that the court had jurisdiction, both of the subject matter and the parties, and that its judgment or decree was rendered within its jurisdiction, and it is immaterial whether the facts showing the jurisdiction are affirmatively recited in the record or not. The cases go no further than the proposition stated.

Borden v. The State, 11 Ark. 519.
Boyd v. Roane, 49 Ark. 397.
McLaughlin v. McCrory, 55 Ark. 444.
McLain v. Duncan, 57 Ark. 50.
McConnell v. Day, 61 Ark. 464.
Smith v. White, 63 Ark. 513.
Vorhees v. Bank of U. S., 10 Peters 449.
Harvey v. Tyler, 2 Wallace, 342.
Secombe v. Railroad Co., 23 Wallace 109.
Applegate v. Lexington & Carter Co. Mining Co., 117 U. S. 255.
Shields v. Coleman, 157 U. S. 169, 182-183.

But there are exceptions to the rule just stated, just as well established as the rule itself, and the recitals in the record of the jurisdictional facts are wholly impotent to establish the jurisdiction, when, as a matter of fact, it really did not exist.

Thus, if it appears, taking the record as a whole (and the whole record must be before the court, and not the record of the judgment or decree alone), (1) that the court had not the jurisdiction of the subject matter; or (2) had not the jurisdiction of the parties, or some particular party, whose interest was disposed of; or (3) was proceeding in the suit outside its established jurisdiction; or (4) was proceedings in ways or by methods not according to its admitted jurisdiction; or (5) was proceeding against parties shown by its record not to be within its jurisdiction for the personal service of process, and to have been brought before the court for the purposes of the suit by published notice, or constructive service of process; or (6) where it appears that the court was not proceeding according to the usual course of a court of common law, or a court of equity in the suit, but was proceeding, under some special statutory authority, in the exercise of powers specially conferred, and to be exercised upon prescribed conditions; then no presumption attaches in any such case that the court had jurisdiction, either of the parties or of the subject matter, or was proceeding within its jurisdiction, but those facts must be established, outside its record, and independently of it, and it is immaterial in such cases what the record states.

In the State v. Hill, 50 Ark. 461, Chief Justice Cockrill stated that the general rule that the statement or recital in a judgment or decree of a domestic superior court of general jurisdiction of service of process, or of the appearance of the parties, when brought before a court of the same jurisdiction, shall not be contradicted, but shall be conclusive upon the parties to the suit, and their privies, upon the subject of jurisdiction, is merely a rule of

public policy, adopted for the correct administration of justice in the local courts, and yields to the equitable principle, that one who is guilty of no *laches* shall not be held to pay the penalty of another's fraud or mistake, if he takes prompt and proper steps to be relieved from the danger of impending injury. And upon this theory, many times, courts of equity, have relieved against domestic judgments or decrees, entirely regular on their face, where, as a matter of fact, there had been no personal service of process, though the record of the suit showed such service.

Ridgeway v. Bank of Tennessee, 11 Humphreys 523.
Bell v. Williams, 1 Head (Tenn.) 229.
Bridgeport Savings Bank v. Eldridge, 28 Conn. 556.
Bissell v. Briggs, 9 Mass. 462.
Pile, *Ex Parte*, 9 Ark. 336.
Ryan v. Boyd, 33 Ark. 778.
Kizer Lumber Co. v. Moseley, 56 Ark. 544.
McLeod v. Tisdale, 57 Ark. 354.
Marine Ins. Co. v. Hodgson, 7 Cranch 236.

The statute of Arkansas (Sandels & Hill's Digest, Secs. 4190-4191, Kirby's Digest, Secs. 4424-4425), after declaring all judgments, orders, sentences and decrees, made, rendered, or pronounced, without notice, actual or constructive, and all proceedings under them, absolutely null and void, provides that: "In all cases where it appears from a recital in the records of any such court that such notice has been given, it shall be evidence of such fact."

It is to be observed that the statute requires that it shall appear from a recital in the record *that notice has been given*, and then the recital shall be *evidence* (not proof) of such fact.

It is safe to say that the recital must be so clear and so distinct that it substantially affirms in words the fact of the giving of the notice required by the law in the particular case.

And before the recital can be evidence against A. B. Ballard and Josephine W. Ballard, of what it recites, it must be made to appear independently of the recital itself that they were parties to the suit, and before the court for the purposes of the suit, when the decree containing the recital was pronounced. For it is certainly the settled law, that no one but parties or privies are bound by, or in any way affected by, the record or proceedings in a suit.

Trammell v. Thurmond, 17 Ark. 212.
Greenstreet v. Thornton, 60 Ark. 374.
Harris v. Hardeman, 14 Howard 341.
Hollingsworth v. Barbour, 4 Peters 477.
Mutual Benefit Life Ins. Co. v. Tisdale, 91 U. S. 238.
Hegler v. Faulkner, 153 U. S. 109.
Pardee v. Aldredge, 189 U. S. 433.
Hannah v. Carrington, 18 Ark. 85.
McArthur v. Scott, 113 U. S. 388.

It would be of little value to an absent and non-resident defendant to be told that he was not bound by a judgment or decree rendered against him in his absence, if it was sufficient to bind him, that the decree so rendered declared he was present, in the court when it was rendered, and he could not contradict it.

However it may be under local rules of decision in any State, with reference to a judgment, or decree, pronounced in a court of such State against a citizen residing in the State, and subject for all purposes to its laws, it is certainly true in the courts of the United States that citizens of other States and non-residents of the State in which the suit was brought, and the judgment or decree rendered, and not personally served with process within the State, and not appearing in the suit, are not estopped by the statements or recitals in the judgment or decree, or elsewhere in the record, of the service of process on them, or of notice to them to appear, or of their appear-

ance in the suit. Notwithstanding such statements, or recitals, in the record, such judgment or decree does not estop such non-resident citizens of other States, and they may deny their truth, and if, upon the trial, it is not established affirmatively against them that the court pronouncing the judgment or decree had jurisdiction of the subject matter, and personally of them, they are not bound by the judgment or decree, and it is absolutely void as to them.

Pana v. Bowler, 107 U. S. 545.
Wilson v. Seligman, 144 U. S. 41.
Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287.
St. Clair v. Cox, 106 U. S. 350.
Owens v. Henry, 161 U. S. 642.
Cooper v. Newell, 173 U. S. 565, etc.
Thorman v. Frame, 176 U. S. 356.
Howard v. DeCordova, 177 U. S. 613.
Andrews v. Andrews, 188 U. S. 37, etc.
Barkman v. Hopkins, 11 Ark. 157.
Iglehart v. Moore, 16 Ark. 46.
Pickett v. Ferguson, 45 Ark. 192.
Needham v. Thayer, 147 Mass. 536.
Vilas v. P. & M. R. R. Co., 123 N. Y. 453, etc.
Henning v. Planters Ins. Co., 28 Fed. Rep. 440.

Thompson v. Whitman, 18 Wallace 457, is perhaps the leading case in this court upon the law, where judgments or decrees are collaterally brought in question in other suits, embracing the same subject matter, for want of jurisdiction, because process was not legally served, or sufficient notice given to the defendant in the judgment or decree.

In the very recent case of National Exchange Bank of Tiffin v. Wiley, 195 U. S. 257, where a judgment, confessed in a court of Ohio, was denied effect in Nebraska, on the ground that the power of attorney under which the judgment was confessed in the court of Ohio was not sufficient to authorize the confession, and the judgment of the Supreme Court of Nebraska so holding was af-

firmed, Justice Harlan said that there had been no departure in the decisions of this court from the doctrine announced in Thompson v. Whitman, whether the question related to courts of general, or to courts of limited, or special jurisdiction, and that that doctrine had been repeatedly affirmed, and referred to a number of the later cases.

195 U. S. 270.

The propositions decided by Thompson v. Whitman are:

1. That want of jurisdiction may always be shown, either as to the subject matter, or the person, or in a proceeding *in rem*, as to the thing.

2. That if the facts necessary to give jurisdiction did not exist, the judgment or decree is wholly void.

3. That if it be shown that the facts necessary to give jurisdiction did not exist, the record will be a nullity, notwithstanding it may recite that such facts did exist, and such recitals may be contradicted or disproved in the second suit.

The case of Ferguson v. Crawford, 70 N. Y. 253, follows Thompson v. Whitman, and contains an examination of many cases.

The decisions have formulated rules substantially as follows: If the face of the record discloses affirmatively what was done toward acquiring jurisdiction, there is no presumption that anything more was done to confer it. Hence, if the record recites such jurisdictional facts, and these are insufficient to confer jurisdiction, the authority of the court to pronounce judgment in the particular case cannot be aided by the indulgence in presumptions that such recital is incorrect, or incomplete, for the affirmation of the existence of jurisdictional facts precludes the possibility of support by way of presumptions, that otherwise would prevail, were there no re-

citals whatever in the record. If the disclosures of the record show affirmatively a want of jurisdiction, the judgment cannot be supported by any presumptions, and is a nullity. And if the entire record shows process was not served, recitals of due service of process cannot sustain the judgment.

Thus in Settlemier v. Sullivan, 97 U. S. 444, the court, in answering the contention that the recital in the judgment, that the defendant had been served with process was proof that due service had been made on him, notwithstanding the manner of the service, as shown by the return of the sheriff on the process, said: "The answer is that the recital must be read in connection with that part of the record which gives the official evidence prescribed by the statute. This evidence must prevail over the recital, as the latter, in the absence of an averment to the contrary, the record being complete, can only be considered as referring to the former."

97 U. S. 448.

In Gregory v. Bartlett, 55 Ark. 30, the decree recited that there had been proper notice to the parties in interest, but the statute under which the proceeding was had required the warning order to appear of record. The warning order did not appear of record in the suit, and the court held the judgment void, saying:

"The recital of the decree that there was proper notice to the parties in interest is not conclusive of that fact, but must be read in connection with that part of the record which gives, or is required to give, the official evidence of jurisdiction, as prescribed in the statute."

55 Ark. 35-36.
Dick v. Foraker, 155 U. S. 404, is to the same effect.

In Lusk v. Perkins, 48 Ark. 238, the judgment recited that "due and legal notice of said order had been given as required by law," but the order on which the notice

was based was in the record, and it was not sufficient to direct the giving of the proper notice, and the court held that the recital in the judgment was ineffectual, and not sufficient to support the judgment."

And see:

Brodie v. Skelton, 11 Ark. 130, 132.
Coons v. Throckmorton, 25 Ark. 60.
Cissell v. Pulaski Co., 10 Fed. Rep. 894.
Parr v. Matthews, 50 Ark. 390.
Cheely v. Clayton, 110 U. S. 708-710.
Martin v. McDiarmid, 55 Ark. 213.
Nevada County v. Williams, 72 Ark. 397.

The distinction was taken between proceedings of a superior court, in cases where it has general jurisdiction, and cases of special or statutory jurisdiction, where the court exercises summary powers, contrary to the usual course of proceedings in a suit at law, or in equity, in Gibney v. Crawford, where the court said: "As a general rule, the proceedings of a superior court, with respect to jurisdictional facts about which the record is silent, are presumed to be within the scope of its jurisdiction until the contrary is shown. But this rule does not apply to proceedings had under special statutory authority. As said by the Supreme Court of New Hampshire (Moss v. Presby, 5 Foster 302), 'A court of general jurisdiction may have special and summary powers wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction.'

"In such cases its decisions must be regarded and treated like those of courts of limited special jurisdiction. The jurisdiction in such cases, both as to the subject matter and as to the persons to be affected by it, must appear. * * * And everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it. In other words, the jurisdiction of the

court in such cases must be shown affirmatively to confer validity on its acts, and unless it is shown its whole proceedings will be invalid, and may be treated as a nullity when called in question in a collateral controversy."

51 Ark. 39-40.
Miller v. Farrelly, 25 Ark. 353.
Morris v. Dooley, 59 Ark. 487-488.
Pulaski County v. Stewart, 28 Grattan (Va.) 879.
Hindman v. O'Connor, 54 Ark. 627, 643.

The court said in Galpin v. Page: "The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits—persons who can be reached by their process—and also over proceedings which are in accordance with the course of the common law. The tribunals of one State have no jurisdiction over the persons of other States, unles found within their territorial limits. They cannot extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy."

18 Wallace 367.

As a conclusion from the statement just made, the court said further: "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant against whom a personal judgment or decree is rendered was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial

jurisdiction of a court, that we should not have felt disposed to dwell upon it at any length had it not been impugned and denied by the Circuit Court."

18 Wallace 368.
Curtis, J., in Lafayette Ins. Co. v. French, 18 Howard 406.

Then, coming down to the particular case, the court said further: "When, therefore, by legislation of a State constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party not a citizen of the State, nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. And such has been the ruling, we believe, of the courts of every State in the Union."

18 Wallace 369.

And see:

Hollingsworth v. Barbour, 4 Peters 466.
Roller v. Holly, 176 U. S. 402-407.

But giving the recital in the decree copied above (record, p. 16) all the force and effect it is entitled to, it does not prove that any notice, as required by Act No. 71 of the Acts of 1895, was published as to A. B. Ballard and Josephine W. Ballard, or their lands.

There is no similarity whatever between the warning order provided for in the statute (Sandels & Hill's Digest, Secs. 5679-5683, Kirby's Digest, Secs. 6055-6059) in suits generally, and the notice prescribed in Act No. 71 (pp. 89-90) of the Acts of the year 1895. The one is entirely different from the other—so different that the general warning order, if published in this suit, did not give A. B. Ballard and Josephine W. Ballard any part of the information they were entitled to, and would have received had the notice under Act No. 71 of the year 1895

been communicated to them. The recital is, after giving more than two hundred and fifty names, and among them A. B. Ballard (though not Josephine W. Ballard): "Were severally, constructively, summoned by publication in a newspaper, published in Crittenden County, Arkansas, weekly for four weeks before this day, proof of which has been previously filed herein." (Record, p. 16.) The decree contains nothing else, and there is nothing else in the record to which resort can be had to make the statements of the decree fuller, or more complete, or more specific.

The complaint prayed "that a warning order issue for the non-resident defendants herein named, requiring them to answer the complaint of the plaintiff at the next January term of this court."

Four weeks could not have elapsed between the 21st of December, 1897, when the complaint was filed (record, p. 14), and the third Monday (17th), January, 1898, when, according to the prayer, the warning order was to be made returnable.

Now, what were the defendants notified to do? No suit was mentioned in the publication, or in the decree, so far as the recital states, and they were not required to file any answer, or make any defense in any suit. The name of the newspaper was not even given. It was not stated that the court or the clerk had made, or had authorized, the publication in the newspaper in the suit. And the fact is, although the entry in the decree states the contrary, that there was no proof of the publication previously filed in the suit, because, as an inspection of the record shows, there is none in the record. Therefore, the contents of the publication are not made more particular, or mor complete, or more specific, by any proof filed.

The position of the court below, stated in what has been quoted above from its opinion, to the effect that the pro-

vision in the statute that the suit to recover the levee taxes, and the decree therein, shall be in the nature of proceedings *in rem*, taken in connection with the other provision that it shall be immaterial that the ownership of the lands may be incorrectly alleged in the proceedings, dispenses with any notice to any owner of any land belonging to a non-resident of Crittenden County, not within the county, and having no occupant on his land, and has had the effect of dispensing with any notice to any such a land owner, and that his title may be disposed of by the court, by its decree, in the suit absolutely, and so as to bind him, though he does not appear in the suit, and has no notice of it, we wholly deny.

In Martin v. Barbour, 34 Fed. Rep. 701, the court passed on the statutes of Arkansas, Mansfield's Digest, Secs. 5782 and 5791, the same being Kirby's Digest, Secs. 7105 and 7114, the one providing that a claimant attacking a tax deed should be required to prove that there had been an entire omission to list, or assess, the property, or levy the taxes, or to give the required notice of the sale, in order to overcome the tax title, and the other that the lapse of two years from the date of the sale should be an absolute bar in favor of the purchaser at the tax sale, or against any action to recover the property, and held that those statutes did not apply to meritorious defenses, and that by meritorious defenses was meant any act or omission of the revenue officers, in violation of law, and prejudicial to the rights or interests of the owner, as well as those jurisdictional and fundamental defects which affect the power to levy the tax, or sell for its non-payment. That case was taken, by appeal, to this court, and the court affirmed the decree of the court below.

The court below had held—and this court took the same view—that the former owner of the property had been unlawfully prevented by the acts or omissions of the officers of the State having the assessment and collection of the taxes, from the opportunity of knowing of

the sale and from redeeming the property, after the sale, within the time allowed by the law, and, also, that the purchaser was chargeable with responsibility for the conduct of the officers, and hence the former owner's right to redeem was extended.

Each court referred to the case of Radcliffe v. Scruggs, 46 Ark. 96, and based its opinion largely upon what that case decided.

The same view, in effect, was taken by the court at an early day in Walker v. Turner, 9 Wheaton 541, where it was held that a sheriff's deed, which is void for want of jurisdiction in the court, under whose judgment the sale took place, was not such a conveyance that possession under it would protect the purchaser under the statute of limitations of the State of Tennessee. And in Moore v. Brown, 11 Howard 414, it was held that the statute of limitations of Illinois, which makes a possession of seven years a bar, in favor of one having a connected title, deducible from any officer authorized by the laws of the State to sell such land for the non-payment of taxes, does not include a case where the deed from an officer is void on its face, because the requirements of the law were not observed in making the sale, and the officer had no authority according to the recitals in the deed to make the sale.

In Redfield v. Parks, 132 U. S. 239, a deed was made for land in Arkansas, sold for the non-payment of taxes, which showed the sale was made on a day not authorized by law, and the court held that the deed was void, and was not admissible in evidence to support an adverse possession under the statute of limitations of that State.

And see Alexander v. Gordon, 101 Fed. Rep. 92, 96, etc.

The same construction should be put on the provisions in the statutes referred to by the court below in the

quotation made from its opinion. They were not intended to affect any substantial right of A. B. Ballard or Josephine W. Ballard with respect to their lands. If those statutes bear the construction the court below has put on them in this case, they are unconstitutional and void.

IV.

The sixth and seventh assignments of error will be presented together. In substance, they are that the notice of the pendency of the suit for the levee taxes, if given according to the requirements of Act No. 71 of the year 1895, conveyed no adequate information of the suit to A. B. Ballard and Josephine W. Ballard, and was not such a notice as was required by the same act, or by the general law, to be given of the suit, to the owners of lands subject to the levee taxes, who were citizens of Arkansas, or residents of or within Crittenden County, or to persons owning and occupying lands similarly located and subject to the same taxation, or to persons having such lands on which there were occupants.

A. B. Ballard was a citizen of Florida and Josephine W. Ballard was a citizen of Georgia, and neither of them was in the State of Arkansas, or had occupants on their lands. Under the statute they were entitled only to a notice to be published weekly in a newspaper published in Crittenden County, or some adjoining county, for four weeks before the day on which the sale of their lands for the levee taxes was to be decreed. Any resident of, or person within, Crittenden County was entitled, under the statute, to personal notice of the suit for the levee taxes for at least twenty days before the decree of sale was rendered, and any owner of land subject to the levee taxes, having an occupant on such land, was entitled to a like personal notice of twenty days before the day of the rendition of the decree.

The assignments of error claim that the notice provided for was not sufficient or adequate as to A. B. Bal-

lard and Josephine W. Ballard, or their lands; and, further, that such notice was not the equivalent of the notice provided for as to residents of Crittenden County, or persons within Crittenden county, or persons having occupants upon their lands, and that by reason of the differences and the discriminations in the provisions of the statute for the two classes of notices, and the notices given under the statute, they were denied the privileges and immunities belonging to them as citizens of the United States, and the privileges and immunities of citizens of Arkansas, and the equal protection of the laws as to their lands within the State of Arkansas, and have been deprived of their property without due process of law.

In Ward v. Maryland, 12 Wallace 430, the court, while not undertaking to define "privileges and immunities," or specify rights intended to be secured and protected by the guaranties contained in the Constitution of the United States, said: "Beyond doubt, those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."

And see Yick Wo v. Hopkins, 110 U. S. 367.

In the Slaughterhouse cases, after referring to Ward v. Maryland, and to Paul v. Virginia, the court said: "The Constitutional provisions there alluded to did not create those rights which it called privileges and immunities of citizens of the State. It threw around them, in that clause, no security for the citizen of the State in which they were claimed or exercised. Nor did it pro-

fess to control the power of the State governments over the rights of its own citizens. Its sole purpose was to declare to the several States that whatever those rights, as you grant or establish them to your own citizens, or as you limit, or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

16 Wallace 77.

In Cole v. Cunningham the court said: "The intention of Sec. 2, Art. 4, was to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions."

133 U. S. 113-114.

In Blake v. McClung the court referred to the former cases, and made a number of quotations from them. The decision there was that it is not in the power of one State, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges, connected with that business, which it denies to citizens of other States. After making a number of exceptions, or distinctions, or qualifying general language in a number of particulars, the court said: "The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one State in a condition of alienage when he is within, or when he moves to, another State, or when asserting, in another State, the rights commonly appertaining to those who are part of the political community known as the People of the United States, by and for whom the government of the Union was ordained and established."

172 U. S. 256-257.

See *Ex Parte* Deeds, 3 Ark. Law. Rep. 159, and 75 Ark. 542.

A. B. Ballard and Josephine W. Ballard were entitled to be treated substantially the same as all other owners of lands subject to the levee taxes, in the suit for the collection of those taxes. Now, let us see if that has been done in the suit as carried on under the legislation.

They were non-residents of Crittenden County, but their deeds for the lands were of record in the Recorder's office there. (Record, pp. 38-39.) A resident of Crittenden County, owning lands with recorded deeds, liable to the same taxation, and proceeded against in the same suit, was entitled to notice of the suit by the service of personal summons of the court "at least twenty days before the day on which such resident owner was required to answer as set out in the summons." (Acts of 1895, p. 90.) And, in addition, if an owner of lands liable for the levee taxes, and proceeded against in the same suit, was in Crittenden County, or had an occupant on his lands, then he was entitled to actual service of summons, probably by analogy, for at least twenty days, as in the case of a resident of the county; or, if not, then, under the general law, for the time prescribed by that law, before a decree could be taken against him. (Acts of 1895, p. 92.)

A. B. Ballard and Josephine W. Ballard, being non-residents of Crittenden County, under the statute, were entitled only to notice by publication weekly, for four weeks prior to the day of the term of court on which final judgment might be entered for the sale of their lands, in some newspaper published in Crittenden County, such notice to be entitled in a suit described as

"St. Francis Levee District
vs. Notice.
Delinquent Lands,"

and including all owners of lands in Crittenden County, or persons having interests in them, named in a general list made a part of the notice, embracing hundreds of

tracts of land, by description, according to the assessment books, and hundreds of owners, and stating each owner's name only in connection with his particular tract of land, and telling all persons and corporations addressed as owning or interested in the lands, that a suit was pending in the Circuit Court of Crittenden County, to enforce the collection of certain levee taxes on such list of lands, each owner's name being set opposite his or her tract of land, together with the amount severally due from each tract of land, and that they were notified they were required to appear and make defense to the suit (not naming any time or place), or the same would be taken for confessed, and judgment final would be entered, directing the sale of their lands for the purpose of collecting the delinquent levee taxes, and the interest, penalty and costs allowed by law. (Acts of 1895, pp. 89-90.)

Every resident of Crittenden County, and every person served with process in the county, had at least twenty days after the personal service on him to make defense. A. B. Ballard and Josephine W. Ballard had only four weeks from the date of the first publication of the notice required, in the newspaper, in which to make defense, before the decree of sale could be taken against them, although the fact was that the one resided, and was at the time, in the State of Florida, and the other resided, and was at the time, in the State of Georgia, and neither one ever knew or heard of Act No. 19 of the Acts of 1893, or Act No. 71 of the Acts of 1895, creating the Levee District, and authorizing the levee taxes, or of the fact that the levee taxes had been assessed on their lands, or of the fact that a suit was pending to collect such taxes, or that they were required to appear and make defense to any suit.

It seems hardly necessary to argue that the notice of the suit given A. B. Ballard and Josephine W. Ballard, absent as they were, under the statute, was not the equivalent of the notice given the persons or corporations pres-

ent in Crittenden County, and in a position to act at once, who were personally served with process, as required by that statute. In the one case, the person or corporation actually served with notice would have the entire twenty days in which to make defense. In the other case, if A. B. Ballard and Josephine W. Ballard were not considered as summoned until the four weeks of publication in the newspaper had expired, then they were required to make defense at once, and upon their failure, a decree might have been taken against them on the very day, or the next day after, they had the notice for the sale of their lands. In order that they should be considered as having four weeks' notice before the decree, it must be assumed that they received the notice on the day of its first publication—a very unreasonable assumption.

In Roller v. Holly, 176 U. S. 398, the court held that the notice under consideration was not a reasonable notice, and was not due process of law within the Fourteenth Amendment of the Constitution, and that the judgment obtained in the suit in question there, in Texas, upon such notice, was not binding upon the defendant, who resided in Virginia. The defendant had been served personally in Virginia, to answer in the suit in Texas, within five days after the service. In that case, Justice Brown referred to various statutes of different States, on the subject of constructive notice, and also to the Act of Congress providing for such a notice. The conclusion of the court, after referring to the statutes, was that in cases of publication of notice to absent and non-resident defendants, it is generally required to be given at least once a week for from four to eight weeks, and in case of personal service out of the State, that no notice for less than twenty days between the service and the return day was contemplated in any of the States, except Mississippi, where a personal notice of ten days seemed to be sufficient.

176 U. S. 412-413.

And see:

Clapp v. Houg, 12 North Dakota 600, and 98 N. W. Rep. 710.
Lockman v. Lang, 132 Fed. Rep. 6-7.

Where a publication of notice is required to be for a specified number of days or weeks before the event, or the return day, it has always been held that publication for the entire period prescribed before the time fixed is necessary to constitute the notice, and that a variance shortening the time renders the notice void.

Early v. Doe, 16 Howard 610.
Guaranty Trust Co. v. Green Cove Railroad, 139 U. S. 145.
Hunt v. Wickliffe, 2 Peters 201.
Townsend v. Martin, 55 Ark. 192.
Martin v. McDiarmid, 55 Ark. 213.
Thweatt v. Howard, 68 Ark. 426.
Pennell v. Monroe, 30 Ark. 661.
Martin v. Barbour, 34 Fed. Rep. 701, and 140 U. S. 634.
Gibney v. Crawford, 51 Ark. 34.
Ronkendorff v. Taylor, 4 Peters 364-365.

The general statute provides, with reference to constructive service of process, that "warning orders shall be published weekly for at least four weeks."

Sandels & Hill's Digest, Sec. 5680.
Kirby's Digest, Sec. 6056.

Another general statute provides: "A defendant against whom a warning order has been made and published, shall be deemed to have been *constructively summoned* on the thirtieth day after the making of the order, and the action may proceed accordingly.

Sandels & Hill's Digest, Sec. 5682.
Kirby's Digest, Sec. 6058.

With reference to defenses in cases of constructive service, the general statute provides that the defense

must be filed on the third day of the term "where the defendant has been *constructively summoned* thirty days."

Sandels & Hill's Digest, Sec. 5737.
Kirby's Digest, Sec. 6113.

Another general statute provides: "A defendant constructievly summoned shall be allowed, at any time before judgment, to appear and defend the action, and, upon a substantial defense being disclosed, time may be given, on reasonable terms, to prepare for trial."

Sandels & Hill's Digest, Sec. 5875.
Kirby's Digest, Sec. 6252.

In the legislation, State and National, making provision for notices to persons out of the jurisdiction, or providing for the exercise by such persons of the rights belonging to them in common with the citizens and residents within the jurisdiction, discrimination as to time and opportunity have almost invariably been made in favor of non-residents, as between them and residents, in order to give the former the benefit of the fact of their absence and of the embarrassment or hindrance resulting from the impossibility of communicating notice to them, or their want of knowledge, so that they may not suffer any injury or loss on those accounts. They are always given longer time within which to do the required act than persons to whom actual notice is given, or who possess the means of present knowledge. Common justice requires that this should be done, as every one must know, as a matter of fact, that absent persons, with only the opportunity furnished by constructive notice of getting information, or acquiring knowledge, are not on an equality with persons on the ground, or having notice, in fact, and cannot, as a general thing, do at once what such persons may do.

In Bellingham Bay & British Columbia R. R. Co. v. New Whatcom, 172 U. S. 318-319, where the constructive

notice was held sufficient, Justice Brewer, delivering the opinion, said: "The purpose of the notice is to secure to the owner an opportunity to protect his property from the lien of the proposed taxes, or some part thereof. In order to be effectual, it should be so full and clear as to disclose to persons of ordinary intelligence, in a general way, what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present, and taking ordinary care of his property, will receive the information of what is proposed, and when, and where he may be heard. And the time and place must be such that, with reasonable effort, he would be enabled to attend and present his objections."

And see Marx v. Hanthorn, 148 U. S. 183-185.
Cunnins v. Reading School District, 198 U. S. 476-477.

Not only must the notice be, in itself, sufficient, and be properly given, but, to constitute due process of law, it must place the defendant in a position to assert his rights, and have the benefit of them, and he must not be disabled from doing so by any obstruction put in his way.

Dean v. Nelson, 10 Wallace 172.
McVeigh vs. The United States, 11 Wallace 259.
Lasere v. Rochereau, 17 Wallace 437.
Windsor v. McVeigh, 93 U. S. 274.
Hovey v. Elliott, 167 U. S. 445.

In view of what has been said, we submit A. B. Ballard and Josephine W. Ballard, in this case, have not been afforded the same opportunity, or an equivalent opportunity, of knowing of the suit for the levee taxes and of making defense to it, which, by the law, was accorded to all other persons having lands liable to levee taxes, and residing in Crittenden County, or being there, or having occupants on their lands.

Now, let us contrast the provisions of the general statutes of Arkansas, having reference to the service of pro-

cess, and notice of suits, with the requirements of Act No. 19 of the Acts of 1893, and Act No. 71 of the Acts of 1895, and test, by the contrast, whether or not reasonable notice was given A. B. Ballard and Josephine W. Ballard, assuming that the notice was given in pursuance of Act No. 71 of the Acts of 1895.

By Act No. 71 of the Acts of 1895, as construed by the court below, in this case, a decree of sale could properly have been taken after the expiration of four weeks from the date of the first publication of the notice, and the decree actually rendered, and in question here, was pronounced on the 14th day of February, 1898, though there had been no continuance or postponement of the suit from the January term, 1898, of the Crittenden Chancery Court to that day, and the January term of that court had expired by law several days before the 14th day of February, 1898.

By the general statute, where a summons in equity proceedings has been personally served on the defendant, he has twenty days, and the three days of the term, within which to file his defense if served in the county, and thirty days and the three days of the term, if served in the State, but out of the county.

Sandels & Hill's Digest, Sec. 5737.
Kirby's Digest, Sec. 6113.

In actions at law, if the defendant is personally served outside the State, he has sixty days and the three days of the term in which to make his defense.

Sandels & Hill's Digest, Sec. 5735.
Kirby's Digest, Sec. 6111.

As already seen, the statute requires, to constitute constructive service of process, a publication of the notice weekly for at least four weeks, and then provides that the defendant to whom the notice is given is not construc-

tively summoned until the thirtieth day after the making of the order, and then allows him until the third day of the term of the court, where he has been constructively summoned thirty days, within which to make his defense.

Sandels & Hill's Digest, Secs. 5680, 5682 and 5737.
Kirby's Digest, Secs. 6056, 6058 and 6113.

By the general statute, before any judgment can be rendered in an ordinary suit, against a defendant constructively summoned, who has not appeared, it is necessary (1) that an attorney should be appointed for him at least thirty days before the judgment is rendered, to inform him of the action; and (2) that a bond should be executed to him by the plaintiff, with sureties, to restore the property taken, or to pay the money the court may award the defendant, if restoration be adjudged.

Sandels & Hill's Digest, Sec. 5877.
Kirby's Digest, Sec. 6254.

And a defendant constructively summoned, who does not appear, has the right to appear in the suit at any time within two years after the rendition of the judgment, and have the action re-tried, upon certain conditions, the same as if no judgment had been rendered, and upon the trial the court may pronounce the judgment which ought to have been pronounced in the first instance, or any other proper judgment, and may restore to the defendant what the plaintiff has recovered, or its value. And the plaintiff cannot make the judgment effectual within the two years, except by serving the defendant personally with a copy of it, and then the defendant has a year after the service in which to apply for a new trial in the suit.

Sandels & Hill's Digest, Secs. 5883 and 5884.
Kirby's Digest, Secs. 6259 and 6260.

The attorney provided to be appointed for the defendant constructively served, as above stated, is re-

quired to make a written statement of what he has done in the suit, under his appointment, and file it with the papers in the suit.

Sandels & Hill's Digest, Sec. 5878.
Kirby's Digest, Sec. 6255.

And if the bond required by the statute, in order to obtain the judgment against the defendant constructively summoned, as stated above, is not given, the court is required, in its judgment or decree, ascertaining the rights of the parties, to retain control over the property, or its proceeds, until the expiration of the two years allowed the defendant to make his appearance.

Sandels & Hill's Digest, Sec. 5879.
Kirby's Digest, Sec. 6256.

And, in addition to all this, before rendering a judgment against a defendant constructively summoned, and who has not appeared, the court, in ordinary suits, may cause the plaintiff to appear personally in court, or before a commissioner, and answer interrogatories, under oath, concerning the matters in the complaint, or any matters of defense, including matters of set-off or counter-claim.

Sandels & Hill's Digest, Sec. 5880.
Kirby's Digest, Sec. 6257.

The Act No. 19 of the year 1893, and No. 71 of the year 1895, dispensed with all these provisions of the general statutes in the suit for the levee taxes. After the notice prescribed in Act No. 71 of the year 1895, they require a decree to be immediately pronounced for the levee taxes, and a sale of the land to pay them, and the sale is to be made for cash, and without any appraisement of the property, and without the right or equity of redemption, although, usually, in the State, there is an appraisement and an equity of redemption. In the case of the fore-

closure of mortgages, the courts of the State, either before or after the decree of foreclosure, secure to the mortgagor the right to redeem.

Sandels & Hill's Digest, Secs. 5110-5114.
Kirby's Digest, Secs. 5415-5420.
Bank v. Directors of St. Francis Levee District, 66 Ark. 490.
Martin v. Ward, 60 Ark. 513.
Gavin v. Ashworth, 4 Ark. Law Rep. 118, and 91 S. W. Rep. 303.

It has been held that a sale of the property of one constructively served with notice, who does not appear in the suit, without giving the bond required by the statute (Sandels & Hill's Digest, Sec. 5877; Kirby's Digest, Sec. 6254), is absolutely void.

Bush v. Visant, 40 Ark. 125.
And see Richie v. Sayers, 100 Fed. Rep. 520.

Act No. 19 of the Acts of 1893, and Act No. 71 of the Acts of 1895 were local and special legislation, passed under the permission of Section 25, Article 5, of the Constitution of Arkansas, as was decided in Carson v. St. Francis Levee District, 59 Ark. 529-530.

As to A. B. Ballard and Josephine W. Ballard, who resided in the States of Florida and Georgia, respectively, and were citizens of those States, the two acts were merely foreign laws, and therefore, as to them only facts, and facts they did not and could not know.

A. B. Ballard and Josephine W. Ballard had owned the lands in controversy for a long time, and it may well be presumed that they knew the general laws of the State of Arkansas having reference to the taxation of lands, and the collection of general taxes, including those providing for sales for the non-payment of taxes, and the redemption from sales.

Statutes had been in force in that State almost from its admission to the Union, giving the right to redeem from sales for taxes, at any time within two years after the date of the sale.

Sandels & Hill's Digest, Secs. 6615-6620.
Kirby's Digest, Secs. 7095-7102.

Knowing those laws, A. B. Ballard and Josephine W. Ballard may have supposed that complying with what was required by them, discharged their duty to the State of Arkansas with respect to their lands and the payment of taxes on them.

Being foreign laws, A. B. Ballard and Josephine W. Ballard were not required to take notice of the Acts No. 19 of the year 1893, and No. 71 of the year 1895.

Story's Conflict of Laws, Secs. 637-638a.
Wharton's Conflict of Laws, Secs. 772-773.
1 Wharton's Evidence, Secs. 292 and 300.
2 Pomeroy's Eq. J., Sec. 854.
Miller v. Johnson, 71 Ark. 174.

It is agreed in this record that each—A. B. Ballard and Josephine W. Ballard—would testify that they had no knowledge of the suit, or its pendency, or that the levee taxes had been assessed prior to the date of the sale, or that the statutes as to the levee taxes had been enacted. (Record, pp. 39-40.)

A foreign law, or a local or special law, being merely a fact, courts of equity relieve against a mistake as to it, or for ignorance concerning it, the same as any other fact.

Cook & Steadman v. Sumner S. & M. Co., 1 Sneed (Tenn.) 698, 715, etc.
King v. Doolittle, 1 Head (Tenn.) 77, 84, etc.

The effect of what was done in the suit for the levee taxes—that is, the proceedings, the decree, the sales, and

the conveyances by the commissioner to Hunter and Hackler, respectively—were efforts or attempts to make contracts or conveyances by or for A. B. Ballard and Josephine W. Ballard of their lands, and must have the effect of valid conveyances of contracts on their part, or as made by them, if they have any effect at all.

A. B. Ballard and Josephine W. Ballard are, therefore, entitled to the same relief because of their ignorance, of mistakes as to, the material facts resulting in the sales, that they would be entitled to had they jointly, instead of the commissioner of the Chancery Court, made the deeds of conveyance to Hunter and Hackler. If they had made such deeds under the state of facts existing, mistaking those facts and their duties or obligations and rights thereunder, it would have been a matter of course for a court of equity to relieve them from the sales, and they are now entitled to the same relief, under the state of facts presented, as if they personally had made the deeds.

2 Pomeroy's Eq. J., Secs. 849 and 838-839.
3 Pomeroy's Eq. J., Secs. 1317-1318.
1 Pomeroy's Eq. J., Secs. 134-135, 170 and 428.
Foster's Fed. Pr. (1st. Edn.), Secs. 319-320.
1 Story's Eq. J., Sec. 140.

The effect and operation of such statutes are well illustrated by the case of Williamson v. Berry, 8 Howard 495. The State of New York passed certain acts for the relief of Thomas B. Clark, in relation to a devise of land, and directed that the acts should be carried into execution by the chancellor of the State. In the course of the proceedings for that purpose, the chancellor directed that the trustee, Clark, might sell or mortgage particular portions of the land, and permitted him to convey parts of it in payment of any debt or debts, upon a valuation to be agreed on between himself and his creditors, and that Clark might apply the proceeds of the sales to the payment of his debts. Clark made a conveyance of a portion of the land to a creditor in payment of a debt he owed

him, and his conveyance was approved by the chancellor in due form.

The question presented for decision was whether or not Clark's deed conveyed a good title, as against the prior owners of the land. The highest tribunal in New York had decided that the chancellor had jurisdiction, under the act, to give the order permitting the sale, and had sustained the title of the purchaser under the sale. The court said the question for decision was whether the chancellor had jurisdiction to give the order permitting Clark to convey a part of the property in payment of a debt, and that, after a careful perusal of the acts and orders, it had concluded that the chancellor had not the jurisdiction to give the order, and that neither the purchaser, or his alienee, could derive from the conveyance any title to the premises.

Decisions were cited, made in the State of New York, and relied upon as sustaining and establishing the construction contended for of the acts of its Legislature, and it was argued that this court was bound by those decisions. The court doubted that the decisions had been made in New York as insisted, and in reply said: "But admitting that the New York cases are otherwise (that is, they had so decided the question), we cannot admit that the rule hitherto observed in the court, of recognizing the judicial decisions of the highest courts of the State, upon State statutes, relative to real property, as a part of local law, comprehends private statutes, or statutes giving special jurisdiction, to a State court for the alienation of private estates. It has never been extended by private acts relative to particular persons, for the reason that whatever a court in a State may do, in such a case, its decision is no part of local law. It concerns only those for whose benefit such a law was passed, and because the decision under it is no rule for any other future case. It may from analogy be cited for the interpretation of another private law, of a like kind, but then

the utmost extension of it would be that there would be two judgments, in two private cases, which only show more plainly that no local law had been made by both."

8 Howard 543-544.

It is to be observed that Williamson v. Berry was decided long before the adoption of the Fourteenth Amendment to the Constitution of the United States, and the provisions of that amendment now have a material bearing upon the questions presented for decision in that case.

After stating the case, the court said there:

"This evidence raises the question whether or not the chancellor had the jurisdiction to give an order permitting Clark to convey any part of the property in payment of a debt. After the most careful perusal of the acts and orders, we have concluded that the chancellor had not the jurisdiction to give an order permitting Clark to convey any part of the devised premises in satisfaction of his debts; and that neither DeGrass, nor his alienee, Berry, can derive from the order, or the conveyance by Clark to DeGrass, any title to the premises in dispute."

8 Howard 544.

Justice Miller, in Huling v. The Kaw Valley Railway Company, 130 U. S. 559, in what he said, did not indicate anything to the contrary of our positions. His language was: "The owner of real estate, who is a nonresident of the State within which the property lies, can not evade the duties and obligations which the law imposes upon him in regard to such property by his absence from the State. Because he cannot be reached by some process of the courts of the State, which, of course, has no efficacy beyond their own borders, he cannot, therefore, hold his property exempt from the liabilities, duties and obligations which the State has a right to impose upon such property. And, in such cases, some substi-

tuted form of notice has always been held to be sufficient warning to the owner, of the proceedings which are being taken under the authority of the State to subject his property to those demands and obligations. * * * It is, therefore, the duty of the owner of real estate, who is a non-resident, to take measures that in some way he will be represented when his property is called into requisition, and if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune, and he must abide the consequences."

130 U. S. 563-564.

Justice Miller spoke only of the general laws of the State and the administration of such laws in the usual way, and of cases in which the notice given to the owner of the land, under the general laws, was "a notice by the ordinary publications which have usually been required in such cases," and such notice, as the authorities show, as is required to constitute "due process of law." He was not speaking of such legislation as Act No. 19 of the Acts of 1893, and Act No. 71 of the Acts of 1895, in question here, operating locally, in only a small portion of the State, and a few counties of the State, and creating a special system of assessment or taxation, different from the general system, or any other before instituted, and providing for a special and summary mode of enforcement or collection, substantially without any notice to the owners of the lands, or the parties to be affected, and without any right of redemption, or any method of protection, except by payment of the sums demanded, strictly according to the demand.

The suit provided for in the Acts of the General Assembly, No. 19 of the year 1893, and No. 71 of the year 1895, as those acts declare, is "a chancery proceeding," and in a "court having chancery jurisdiction" (Acts of 1895, p. 88), and is to be "conducted in accordance with the

practice and proceedings of Chancery Courts," except as expressly excepted in the act (Acts of 1895, p. 92), and the court is required to construe the law "liberally, to give said assessment lists the effect of *bona fide* mortgages for a valuable consideration, and a first lien upon the said lands as against all persons having an interest therein." (Acts of 1895, p. 92.)

It was agreed in the Chancery Court of Crittenden County, between the parties, that the matters presented by the pleading of A. B. Ballard and Josephine W. Ballard should be heard as an agreed case, upon the agreed statement of facts, before filed in the cause, and the evidence therein referred to, without any plea thereto (record, p. 37), and, further, that the agreement as to facts should be filed as part of the record, and treated as such in that court, and the Court of Appeals, and either party was to have the benefit thereof for the purposes of the suit and the appeal. (Record, pp. 40-41.)

The pleading presented by A. B. Ballard and Josephine W. Ballard, when they came into the case, asked the court that it be taken and considered as an original complaint under Section 5882, Sandels & Hill's Digest (Kirby's Digest, 6259), and as a petition under Sections 5839-5843, Sandels & Hill's Digest (6215-6220, Kirby's Digest), and as an original complaint under Sections 4197-4199, Sandels & Hill's Digest (4431-4433, Kirby's Digest), and Sections 6121-6124, Sandels & Hill's Digest (Sections 6520-6521, Kirby's Digest), and also that it be taken and filed as a bill of review of the decrees and proceedings in the suit. (Record, pp. 27-37.)

The court made an order upon the pleading (record, p. 26), that leave was given to file it, and that A. B. Ballard and Josephine W. Ballard were made parties to the suit for the purposes set out in the pleading.

The first of the statutes referred to (Kirby's Digest, Sec. 6259), provides: "Where a judgment has been ren-

dered against a defendant, or defendants, constructively summoned, and who did not appear, such defendants, or any one or more of them, may, at any time within two years, and not thereafter, after the rendition of the judgment, appear in open court, and move to have the action re-tried; and security for the costs being given, such defendant, or defendants, shall be permitted to make defense, and thereupon the action shall be tried anew as to such defendant, or defendants, as if there had been no judgment. And upon the new trial the court may confirm, modify or set aside the former judgment, and may order the plaintiff in the action to restore to any such defendant, or defendants, any money of such defendants paid to them under such judgment, or any property of such defendants obtained by the plaintiff under it, and yet remaining in his possession, and pay to the defendants the value of any property which may have been taken under an attachment in the action, or under the judgment, and not restored; provided the provisions of this section shall not apply to judgments granting a divorce except so far as relates to alimony."

The decree of sale was rendered on the 14th day of February, 1898 (record, p. 14), and the pleading of A. B. Ballard and Josephine W. Ballard was filed on the 25th day of September, 1899 (record, p. 37), and was ordered to be filed at the September term, 1899, of the Chancery Court (record, p. 26), and was treated by the court below as properly presenting the matters in controvery for adjudication. (Record, pp. 72 and 80.) And see Waldo v. Thweatt, 64 Ark. 131, for the construction put by the court upon the statute quoted. Also Porter v. Hanson, 36 Ark. 599.

In their pleading A. B. Ballard and Josephine W. Ballard fully set out (Record pp. 28-35) their objections to the decree of sale and the proceedings thereunder, as well as their defenses against Hunter and Hackler, purchasers at the sale, and among them, that on the 10th day of

March, 1899, they tendered to Hunter and Hackler the sums they had bid for the tracts of land they purchased, and such additional sums as they were entitled to, and asked them to allow the redemption of the said lands from the said sales, but they refused to permit the redemption, and insisted upon their titles. They also alleged that they brought the money into court and offered to pay it as the court might order. (Record p. 32.) The tender and refusal are agreed to as facts in the agreed statement of facts. (Record pp. 40-41.)

In the prayer of the pleading (Record p. 36) it was asked that all the parties to the suit, including the plaintiff, the Board of Directors of the St. Francis Levee District, and Hunter and Hackler, the purchasers, be treated as parties and brought before the court as defendants, if necessary, by process, and that the decree of sale and all subsequent decrees affecting the lands of A. B. Ballard and Josephine W. Ballard, be reviewed, reversed, vacated, set aside and held for naught. It was also asked that the sales made to Hunter and Hackler be vacated, and that the deeds made them be canceled, and that the title of A. B. Ballard and Josephine W. Ballard be cleared and quieted and confirmed, and made perfect against the proceedings in the suit for the levee taxes, and then that A. B. Ballard and Josephine W. Ballard be permitted to pay the levee taxes due on their lands, including all penalties, interest and costs, and they again offered to bring into court and deposit the money necessary, to be disposed of by the court. They then prayed further that, if more appropriate, they be allowed to redeem the lands from Hunter and Hackler by paying them the sums they were entitled to in order to effect the redemption, and they again offered to bring the money into court and deposit it subject to the order of the court. Finally, if proper, they asked leave to increase the bids of Hunter and Hackler, respectively, for the tracts of land, and offered to increase such bids by the amount of 50 per cent. upon each bid, and again offered to bring the money

into court to make good the bids. (Record pp 36-37.) There was also a prayer for general relief.

The parties agreed that, without any plea, the matters presented in the pleading of A. B. Ballard and Josephine W. Ballard should be heard as an agreed case upon the agreed statement of facts before then filed (Record pp. 38-41), and the evidence referred to in that agreed statement (Record p. 37.).

Pennoyer v. Neff, 95 U. S. 715, was heard on an agreed statement.

While in consequence of the condition of the record A. B. Ballard and Josephine W. Ballard have been obliged to assume the nominal positions of plaintiffs in the suit, it is clear that they, in substance, are defendants, and that the suit is the same suit the Board of Directors of the St. Francis Levee District brought, as appears by the complaint (Record p. 9), for the collection of the levee taxes, and that the burden is upon it, or Hunter and Hackler, the purchasers, to establish its right to the decrees, and the correctness and regularity of the sales under the decrees at which Hunter and Hackler have bought, as muniments of their title, and in order to destroy or defeat the title of A. B. Ballard and Josephine W. Ballard.

This is so because of the statute already copied. A. B. Ballard and Josephine W. Ballard were only constructively summoned in the suit and did not appear. They have come in now, as permitted by the statute, and the court has recognized them as before it in the suit, under the statute. The statute provides that such defendants "shall be permitted to make defense, and thereupon the action shall be tried anew as to such defendant or defendants, as if there had been no judgment."

Sandel's and Hill's Digest, Sec. 5882.
Kirby's Digest, Sec. 6259.

By becoming purchasers at the sale and complying with their purchases Hunter and Hackler, respectively, made themselves parties to the suit with respect to the land purchased by them, respectively, for all the purposes of the suit and subject to all the decrees and proceedings had, and to be had, therein.

Bright v. Pennywit, 21 Ark. 130.
Porter v. Hanson, 36 Ark. 591.
Pickett v. Ferguson, 45 Ark. 177.
Burgess v. Poole, 45 Ark. 373.
Camden v. Mayhew, 139 U. S. 73.
Kleber's Void Judicial and Execution Sales, Sec. 467.

It is quite clear from the record that the courts below —both the Crittenden Chancery Court and the Supreme Court of Arkansas—have treated the case as one presenting all the questions involving the title to the lands in controversy, as between A. B. Ballard and Josephine W. Ballard on the one side, and Hunter and Hackler, respectively, on the other, which could be raised, or could be presented in any suit or proceeding that either party could institute for the purpose of trying those questions.

Randolph v. Nichol, 74 Ark. 93, 101.

And all the questions that could be presented in any such suit are now before this court upon this writ of error. The lands having been sold and the deeds made in the suit now here, intervention in the suit to attack the sales and deeds and maintain their own titles to the lands was the appropriate remedy of A. B. Ballard and Josephine W. Ballard.

Kirby's Digest, Secs. 6012 and 6259.
Davoue v. Fanning, 4 Johnson's Ch. R. 199, 202-204.

Under the Constitution of the United States (Art. 4. Sec. 2), A. B. Ballard and Josephine W. Ballard as citizens of Florida and Georgia, respectively, are entitled

to all the privileges and immunities of citizens of Arkansas, and, by the Fourteenth Amendment, the State of Arkansas could, not make and cannot enforce against them any law having the effect to abridge their privileges or immunities as citizens of the United States, or of depriving them of their lands without due process of law, or denying them as to their lands the equal protection of the laws. They deny that they have been conceded in this case the privileges and immunities of citizens of Arkansas, and claim that their privileges and immunities as citizens of the United States have been abridged by the legislation of Arkansas and the decision of the court below in this case, and that the effect of that legislation and of that decision is to deprive them of their lands, without due process of law, and also to deny them, with respect to their lands, the equal protection of the laws of the State of Arkansas existing when the facts on which their rights depend, as presented in this suit, occurred or came into existence. They claim the benefit of the laws of the State of Arkansas, as then established, and deny that the decision in this case, or any departure from such established laws, or any change in the laws, or in the course of decision since their rights accrued, can affect such rights, and they ask the court in this case to pass upon and determine all those questions.

Louisville Trust Co. v. City of Cincinnati, 76 Fed. Rep. 296.
Jones v. Great Southern Fireproof Hotel Co., 86 Fed. Rep. 370.
Great Southern Fireproof Hotel Co. v. Jones, 116 Fed. Rep. 794.
Great Southern Fireproof Hotel Co. v. Jones, 193 U. S. 532.
Thomas v. Board of Trustees, 195 U. S. 207.
Wells Company v. Gastonia Company, 198 U. S. 177.
Butz v. Muscatine, 8 Wallace 575.
Olcott v. The Supervisors, 16 Wallace 690, etc.

In Parker v. Overman, 18 Howard 137, and later in Martin v. Barbour, 140 U. S. 634, each a case brought in

a court of Arkansas to confirm a tax title under the statute of that State and then removed to the Circuit Court of the United States on the ground of diverse citizenship, the court sustained its jurisdiction to pass on the merits of the controversy and determined, after passing on all the questions raised as to the regularity and validity of the sales for the taxes, and the titles of the purchasers at the sales, that the sale and purchase in each case was invalid, and that the deeds the purchasers held were mere clouds on the title of the former owners, and decreed that they be canceled and annulled. 18 Howard, p. 143, and 140 U. S. 647, and 34 Fed. Rep. 713. And see Wehrman v. Conklin, 155 U. S. 314. And in this connection the statute already referred to under which A. B. Ballard and Josephine W. Ballard have come into this case (Sandel's & Hill's Digest, Sec. 5882; Kirby's Digest, Sec. 6259) is to be considered.

The land bought by Hackler was valued at $320.00 and the price she paid was $18.50. Two of the tracts bought by Hunter, aggregating 480 acres, were valued together at $690.00, and he paid for those tracts $78.25, and for the other tract valued at $160.00, $14.50.

The valuations had been arrived at by estimating the increase in value on each acre of land by reason of the levee to be constructed and that increase on each acre was put at $2.00, and then the levee taxes were all fixed on each acre at 2 per cent. of such increased value. The intrinsic value of the lands, independently of the increased value to result from the construction of the levee, was not estimated or considered.

It is manifest, therefore, that the prices paid by Hunter and Hackler for the lands they bought were but an insignificant part of their value.

It is true that ordinarily mere inadequacy of price will not invalidate a judicial sale or execution, but it is always a circumstance to be considered by a court of equity

in passing on the question whether such judicial or execution sale shall stand or be set aside when that question is presented.

In Martin v. Barbour, 34 Fed. Rep. 711, the court said: "The rule *caveat emptor* applies to the purchaser of a tax title. He is not a *bona fide* purchaser for value without notice. For such titles the commissioner is directed to execute to the purchaser a quit claim deed. (Sec. 4245 Mansfield's Digest.) The purchaser takes the land in the same plight the State held it, and subject to the same equities and defenses. Cooley on Taxation (2d Edition), 475-553; 2 Desty on Taxation 850." 34 Fed. Rep. 711.

That case was affirmed on appeal by this court, 140 U. S. 634-646, etc.

And see:

Worthen v. Fletcher, 71 Ark. 386.
Black on Tax Titles (1st Edn.), Sec. 263.

A long line of cases in Arkansas has settled that any unfair conduct in procuring a judgment or decree, or on the part of those controlling or making a judicial or execution sale, and any combination of facts which make it reasonably certain that the judgment or decree was unlawfully obtained, or the sale was made under circumstances having a tendency to prevent the realizing of a fair price from the bidders, when added to the inadequacy will be taken hold of by the courts to grant a new trial or to enjoin the judgment or decree, or to vacate the sale or open the biddings, or permit a redemption, or to do whatever may be required to accomplish the ends of justice. Kizer Lumber Co. v. Mosley, 56 Ark. 544 is a case on the question. And see Brittain v. Handy, 20 Ark. 381; Penn v. Tolleson, 20 Ark. 62; Thomason v. Craighead, 32 Ark. 391; State National Bank v. Neel, 53 Ark. 110.

See also Lee v. Armour, 35 Arks. 123.
Peel v. January, 35 Arks. 331.
Guess v. Amis, 54 Arks. 1.
Chambliss v. Reppy, 54 Arks. 539.
McLeod v. Tisdale, 57 Arks. 354-355.
Waldo v. Thweatt, 64 Arks. 130-132.

A. B. Ballard and Josephine W. Ballard had the right to reside in Florida and Georgia, respectively, and own the lands in controversy in Arkansas, and to allow the lands to be unimproved and vacant. They were under no obligation or duties to the State of Arkansas with reference to the lands except such as its general laws imposed. In the Act of Congress and the acceptance by the General Assembly constituting the admission of Arkansas to the Union, it was provided that "in no case shall non-resident proprietors be taxed higher than residents," thus putting the lands not owned by citizens or residents on an equality with those owned in the State.

Sandel's & Hill's Digest, pp. 197-199.
Green v. Biddle, 8 Wheaton, pp. 11-18 and pp. 69-85.

A. B. Ballard and Josephine W. Ballard were absent from the State of Arkansas and had no notice of the levy of the levee taxes on their lands, nor of the suit to recover them, and no notice that the legislation, namely, the two acts of the General Assembly, No. 19 of the year 1893, and No. 71 of the year 1895, had been enacted. If any notice was given them under the statute (Acts of 1895, No. 71) in the suit for the levee taxes, it was such a notice as in all probability never could reach them and which, as a matter of fact, never did reach them. The complaint in the suit was filed on the 21st day of December, 1897 (Record p. 14). The term of the Chancery Court of Crittenden County begun on the third Monday of January, 1898. That term of court was required to end before the first Monday of February, 1898, because the same chancellor was required to hold the regular term

of the Cross County Chancery Court on that day. The decree of sale was pronounced on the 14th day of February, 1898. (Record p. 14.) How the court came to be in session on that day the record does not disclose. At the sales made them in the suit Hunter and Hackler purchased the property for less than a fiftieth part of its real value.

Under these facts and without going into any others we submit the sales to Hunter and Hackler should not be allowed to stand. Even if the requirements of the legislation contained in Act No. 19 of the Acts of 1893 and Act No. 71 of the Acts of 1895 have been literally complied with they should not be allowed to stand.

In Graffam v. Burgess, 117 U. S. 180, the court held that great inadequacy of price at judicial sales of real estate requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise a presumption of fraud. In the opinion in that case Justice Bradley said: "It is insisted that the proceedings were all conducted according to the forms of the law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended the more particular the parties to it often are to proceed according to the strictest forms of law." 117 U. S. 186.

In the later case of Shroeder v. Young, 161 U. S. 334, the court had the question before it and referred to a number of cases, and held that while mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, the courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, as if several lots have been sold in bulk where they should have been sold separately, or sold in such a man-

ner that their full value could not be realized, if bidders have been kept away, if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security, or if the sale has been collusively or in any other manner conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price, the sale will be set aside and the owner permitted to redeem.

161 U. S. 337-338.

And see in addition:

Byers v. Surget, 19 Howard 303.
Howell v. Baker, 4 Johnson's Chancery 118.
Wheeler v. Smith, 9 Howard 55, 81-83.
Slater v. Maxwell, 6 Wallace 269, 274-277.
Snell v. Insurance Co., 98 U. S. 85, 88-93.
Griswold v. Hazard, 141 U. S. 260, 283-288.
Adams v. Cowen, 177 U. S. 471, 479-485.

Slater v. Maxwell involved a sale for taxes. In that case Justice Field said: "It is essential to the validity of tax sales not merely that they should be conducted in conformity with the requirements of the law, but that they should be conducted with entire fairness. Perfect freedom from all influences likely to prevent competition in the sale should be, in all such cases, strictly exacted. The owner is seldom present and is generally ignorant of the proceeding until too late to prevent it. The tax usually bears a very slight proportion to the value of the property, and thus a great temptation is presented to parties to exclude competition at the sale and to prevent the owner from redeeming when the sale is made. The proceeding, therefore, should be closely scrutinized, and whenever it has been characterized by fraud or unfairness, should be set aside, or the purchaser be required to hold the title in trust for the owner." 6 Wallace 276.

Martin v. Barbour, 34 Fed. Rep. 701, and 140 U. S. 634, also involved a sale for taxes. That was a proceeding

brought by the purchaser at a tax sale to confirm his purchase under the statute of Arkansas providing for confirmations of such titles. The relief the former owner obtained was in defense of that suit, on the ground that the tax sale was void for numerous reasons.

In that case the lands had been struck off at a sale for the taxes for the year 1884 to the State, and the statute made it the duty of the clerk to record in a book each town lot or tract of land sold to the State, with the taxes, penalty and costs due thereon, and immediately after the sale to transfer upon the tax books each lot or tract of land sold for taxes to the name of the purchaser, thereafter to be assessed in the name of the purchaser, except where the State was the purchaser, in which case the lot or tract of land was no longer to be assessed for taxation, but was to be taken off the tax books and entered in a book of State lands, which the clerk was required to keep. If a tract of land was not redeemed from the State within two years from the date of the sale the Commissioner of State Lands was authorized to sell it at private sale for the sum for which the State had bought it.

The lot in controversy in that case was sold, after two years, to Martin, who asked the confirmation of his title. (34 Fed. Rep. 708-709.) The clerk did not transfer the lot or tract of land in controversy after the sale for 1884 to the State, or take it off the tax books, but it was assessed for taxation for 1885, the next year, against the original owner, and for several years thereafter like assessments were made, and the taxes for all those years were paid by the original owner, leaving out, however, the taxes for 1884, the year for which the State had purchased the lot, which remained unpaid. When the agent applied after the sale to the collector to pay the unpaid taxes on the lot or tract he was told there was nothing due except for the year 1885, which was the next year after the sale to the State, and those taxes he paid. The property was a boarding house or hotel, worth $7,000 or

$8,000. The owner resided in a distant State and had a local agent. The agent had the money with which to pay the taxes, but he appropriated the money and left the State without paying them. The price for which the State bought the land for taxes was $110.95. After the time for redemption had expired Martin, the purchaser from the State, set up his title and asked for its confirmation.

The court held that the owner had been prevented from discovering the sale and making the redemption by the official misconduct or mistake of the clerk who made out the assessment book, and that she should be permitted to redeem on discovering the facts. The decree entered was that the deed to Martin, the purchaser from the State, was void, but he had a lien on the lot for the purchase money and interest, and that the lot should be sold for its payment unless that amount was paid in a prescribed time.

On the immediate point now being presented the Circuit judge said: "The county clerk makes and keeps the record of the sale of delinquent lands for taxes. He makes and keeps the record showing the lands bid in by the State for taxes, and he makes up the assessment book of real estate, and is enjoined by law not to put such lands on it, and certainly, if he does, their previous forfeiture ought to be noted. When he put the land in controversy on the tax books for 1885 and again for 1886, without noting the previous forfeitures, it amounted to a solemn declaration of record, repeated each of those years, that it had not been forfeited for taxes, and that no deliquent taxes were due upon it. The owner and her agent had a right to presume that the clerk had done his duty. On these facts the owner is entitled to redeem on paying the amount bid by the State, with interest from that date." 34 Fed. Rep. 711.

On that point this court said, among other things: "To permit the sale to the appellant to be confirmed would

be to assist the State to take advantage of its own wrong. The right to redeem is a substantial right, and was prevented from being exercised within the statutory period of two years by the dereliction of duty on the part of the officers of the State. The sale was made contrary to law, and it was the duty of the Circuit Court, under the statute, to annul it in order to allow the redemption to take place. No more manifest case for the interposition of a court of equity can be imagined. The State is bound by the acts of her officers in placing the lot on the tax books for the years 1885 and 1886, and receiving from the appellees the taxes for those years. Equity will treat the transaction as a waiver of the prior supposed forfeiture, and will regard the tax paid for 1885 and 1886 as so much paid toward redemption, and will permit the payment of the rest. The appellant took his deed for the land in the same condition in which the State held it and subject to the same equities and defenses. The State, having created its bureau of taxes, is bound to see to it that its officers impart correct information to parties dealing with it and do not mislead them." 140 U. S. 646-647.

And see:

Dubois v. Hepburn, 10 Peters 22-23.
Cocks v. Izard, 7 Wallace 559.
Corbett v. Nutt, 10 Wallace 464.
Jackson v. Ludeling, 21 Wallace 632, etc.
U. S. v. Lee, 106 U. S. 199, etc.
Gage v. Pumpelly, 115 U. S. 454.
Krippendorf v. Hyde, 110 U. S. 276.
Johnson v. Waters, 111 U. S. 667, etc.
Gumbel v. Pitkin, 124 U. S. 131.
Arrowsmith v. Gleason, 129 U. S. 97, etc.
Marshall v. Holmes, 141 U. S. 596, etc.
Rolling Mill Co. v. Ore & Steel Co., 152 U. S. 596, etc.
Ritchie v. Sayers, 100 Fed. Rep. 532, etc.
Fahrney v. Kelly, 102 Fed. Rep. 407, etc.

V.

The eighth assignment of errors is that the sales of the lands of A. B. Ballard and Josephine W. Ballard were void and passed no title because in the suit in which the sales were made the laws of the State of Arkansas applicable, were disregarded and violated as follows:

(a) There were no sufficient allegations of a cause of action in the complaint in the suit as against A. B. Ballard and Josephine W. Ballard, or their lands.

(b) There was no sufficient affidavit made and filed to support a warning order, or order for notice to A. B. Ballard and Josephine W. Ballard.

(c) There was no sufficient proof of the publication of any warning order or any notice to A. B. Ballard and Josephine W. Ballard filed or produced in court when the decree of sale of their lands was rendered; and

(d) The decree of sale does not state, and the decree does not show, the facts essential to the validity of the decree of sale as against A. B. Ballard and Josephine W. Ballard, or their lands.

The decree, therefore, has denied to A. B. Ballard and Josephine W. Ballard the benefit of the laws of the State of Arkansas, in the suit, in violation of the Constitution of the United States, and thereby they have been deprived of their property without due process of law.

We will take up these grounds in the order named:

(A)

The sufficiency of the complaint.

The complaint is in the record, pp. 9-14.

It is not signed by the plaintiff, or its attorney, nor verified by the plaintiff as required by the statute (Kirby's Digest, Sec. 6120), the place for the signature of the solicitor being blank.

Neither Act No. 19 of the Acts of 1893, nor Act No. 71 of the Acts of 1895, prescribes what shall be contained in the complaint in the suit to collect the levee taxes, but the latter act does provide for granting the relief "as prayed in the complaint."

Acts of 1895, p. 91.

The suit is to be in a court having chancery jurisdiction, and by chancery proceedings, "conducted in accordance with the practice and proceedings of Chancery Courts."

All or any part of the delinquent lands in any county may be included in one suit for the collection of the delinquent taxes, and all delinquent owners of such lands, including those unknown, may be included in the suit as defendants; and a general notice of the pendency of the suit may be given as against non-residents of the county and unknown owners, in a form prescribed. The suit was to be styled:

"ST. FRANCIS LEVEE DISTRICT

vs. Notice.

DELINQUENT LANDS."

The description or list of the lands was to be included in the notice, and opposite each tract of land was to be the name of each supposed owner, and the amounts severally due from each. The persons and corporations interested were to be notified that they were required by law to appear and make defense to the suit, or it would be taken for confessed and judgment would be entered directing a sale of the lands for the purpose of collecting the delinquent levee taxes and interest, penalty and costs allowed by law.

Acts of 1895, pp. 89-90.

The court was required by the acts to give judgment against the persons claiming to be the owners of the lands for the amounts of the assessments and the penalty and interest from the end of thirty days, and all the costs of the proceedings.

Acts of 1895, p. 88.

The complaint in the suit, therefore, must set out enough to constitute a cause of action in favor of the plaintiff—the Board of Directors of the St. Francis Levee District, or the St. Francis Levee District against A. B. Ballard and Josephine W. Ballard, or their lands, for the levee taxes sued for. The record is complete, and the court can infer nothing not stated in it.

Gregory v. Bartlett, 55 Ark. 36.
Galpin v. Page, 18 Wallace 364.

See the certificate of the clerk authenticating the transcript of the record. (Record, pp. 78-79.)

The list of the lands of A. B. Ballard and Josephine W. Ballard, as contained in the list attached to the complaint is in the record, p. 12, and is as follows:

"TOWNSHIP 4 NORTH, RANGE 7 EAST.

West half southeast quarter, Section 32, township 4 north, range 7 east, 480 acres, assessed to A. B. Ballard:

Taxes for 1895 ..... $19.20
Taxes for 1896..... 19.20
Taxes for 1897..... 19.20

West half northeast quarter, Section 32, township 4 north; range 7 east, 80 acres, assessed to A. B. Ballard:

Taxes for 1895..... $3.20
Taxes for 1896..... 3.20
Taxes for 1897..... 3.20

Northeast quarter, Section 31, township 4 north, range 7 east, 160 acres, assessed to A. B. Ballard:

Taxes for 1895 ..... $6.40
Taxes for 1896 ..... 6.40"

After setting out what was done towards authorizing the levy of the levee taxes (Record, p. 12) the complaint stated "that all the lands in said district were duly assessed for taxation as per the said increased value, or betterment thereof, by the assessors elected under said acts, and in accordance with the terms and requirements thereof, and the benefits or increased value, as aforesaid, of the lands herein described, and referred to as belonging to the said defendants, were assessed at the value of two dollars ($2.00) for each and every acre thereof for said year 1894, and the said lands were likewise assessed for at the same rate for 1894, 1895, 1896 and 1897, said lands being and constituting a part of the area and territory of said Levee District."

Record, pp. 12-13.

This was not sufficient.

Jacks v. Dyer, 31 Ark. 338, 339, etc.

There is nothing else in the complaint on the subject of the assessment of the lands.

The Act No. 19 of the year 1893 provided for the meeting of the land owners in each county of the Levee District, at which elections were to be held, and they were to vote upon the proposition to levy an annual assessment for levee purposes, and that two-thirds of those voting at all the meetings in the Levee District should vote in favor of the proposition before the levee tax could be assessed..

The Supreme Court of Arkansas sustained the constitutionality of the act on the ground that the Board of Directors of the St. Francis Levee District was not a corporation within the provisions of Section 2, Article 12 of the Constitution of Arkansas, but was created only as a governmental agency, or *quasi* corporation, and that the grant of its powers—that is, to levy and collect and apply the levee taxes—was to be assimilated to the grant

of similar powers to counties, townships, school districts, and the like organizations for local purposes, and was to be supported on the same grounds.

Carson v. Levee District, 59 Ark. 533-535.

And see:

Davis v. Gaines, 48 Ark. 371, 385, etc.
Levy Court v. Coroner, 2 Wallace 507.
School District v. Insurance Co., 103 U. S. 708.

In Washington v. The State, 13 Ark. 752, the leading case on the subject, the distinction was taken between taxation for State purposes, and taxation or assessments for local purposes, and the doctrine was announced that such local taxation or assessments may well be authorized, if self imposed, according to the discretion of the people of the locality, through their agents, or officers elected by them, and directly responsible to them.

The distinction was also taken in that case between the power of the State as to taxation, and its power to grant authority to counties and towns to levy taxes for local purposes.

It was held that the legislature could authorize counties and towns to levy taxes upon designated licensed occupations for local purposes, but the General Assembly itself had no power to designate callings as taxable, and tax them for State purposes, and Chief Justice Cockrill said, in Baker v. The State, 44 Ark. 137, that this distinction had never been questioned by the court, but had been recognized and approved from time to time.

In McGehee v. Mathis, 21 Ark. 40, the first case in the State bringing directly before the Supreme Court the power of the State to create levee districts, and authorize the assessment and collection of taxes upon the lands within the district, and their application to the erection of levees to protect against overflows, by a special act

of the legislature, the county of Chicot was laid off into districts, and an election was provided to be held by the people of each district for an inspector, and the inspectors of all the districts as a body, were authorized to adjust the assessment and levy of the tax, and the County Court was empowered upon their assessment to fix the rate of taxation for levee purposes. The inspectors were elected from residents of each Levee District, and their assessment was reported to the County Court—the tribunal authorized by the Constitution to assess and collect taxes for county purposes, and that court was to fix the rate of taxation. There was no attempt by the legislature arbitrarily to impose or compel the assessment of any levee tax, but the whole matter, both the assessment and levy of the tax, and the amount of it were submitted to the people of the county, as divided into Levee Districts. Al the previous legislation authorizing local assessments for public improvements, or for local purposes, it is believed, has submitted the matter of the assessment, and the levy of the taxes to the people of the locality to be immediately affected, and has allowed them to determine the questions for themselves.

The fundamental idea in a republican government that the people who are to pay the taxes must vote them, has been recognized as applicable to local assessments, or taxation for local purposes, and it has frequently been decided in the courts that the legislature of the State cannot directly, and without reference to the consent of the people of the particular locality to be affected, enact legislation imposing a debt, or liability for a debt, or an assessment, or a charge upon such locality, or its people or their property, against their will, and collect and appropriate the proceeds.

See the question reviewed in Cooley on Taxation (1st Ed.), Chap. 21, where many of the cases are cited.

Ordinarily the legislature cannot delegate the power of taxation, and the exception (if it may be called an ex-

ception) is as to counties, municipal corporations, school districts, and other governmental agents, or *quasi* corporations, designed and organized for the purposes of local administration.

The people of such localities under an express grant by the legislature of the authority to do so, may exercise powers, more or less legislative in their character, and operating directly and exclusively on themselves, or their property, including the power of local taxation, and the appropriation of the moneys collected. But the State cannot arbitrarily, and in its own discretion, enact and enforce such legislation.

Cairo & Fulton R. R. Co. v. Parks, 32 Ark. 131, 137-139.
Fluty v. School District, 49 Ark. 94.
Hudson v. Jefferson County, 28 Ark. 359, 361-364.

In speaking of a local improvement district, in Fitzgerald v. Walker, 55 Ark. 153, the court said:

"Its powers are derived directly from the legislature, and in exercising them the court acts as the agent of the property owners, whose interests are affected by the duties it performs."

And see:

Memphis Trust Co. v. Board of Directors of St. Francis Levee District, 69 Ark. 284.
City of Little Rock v. Board of Improvement, 42 Ark. 160, etc.
Cooley's Constitutional Limitations (6th Ed.), Chap. 21, p. 139, etc.
Cooley on Taxation (1st Ed.), Chap. 3, p. 48, etc., and Chap. 21, p. 747, etc.

The first essential, therefore, of the complaint in this suit was that it set out all the facts with reasonable certainty, necessary under Act No. 19 of the year 1893, to establish the right of the Board of Directors of the St.

Francis Levee District, to assess, levy, collect and dispose of the levee taxes for the several years for which the suit was brought. Each year's taxes, as appears from the legislation, was distinct and separate from every other year's taxes. In this suit, it will be noticed from the complaint, that levee taxes were sued for, for the years 1893, 1894, 1895, 1896 and 1897. The taxes for 1893, or 1894, however, on the lands of A. B. Ballard and Josephine W. Ballard were not sued for, but only the taxes on all the tracts for 1895 and 1896, and on two tracts for 1897.

It is apparent that neither Act No. 19 of the year 1893, nor Act No. 71 of the year 1895, providing for the suit to collect the levy taxes contemplated that the taxes for more than one year should be sued for in one suit. By the very terms of each act, the suit to collect the levee taxes was to be commenced (Act of 1895, p. 88) at once, if the assessments were not paid within thirty days after the first Monday of October, on which day the collector was directed to proceed to make collections.

This language could not possibly mean that the Board of Directors of the St. Francis Levee District should delay in enforcing the taxes from one year to another until as many as three, or four, or five years' taxes were due and delinquent.

But suppose we concede that more than one year's levee taxes could be sued for under the statutes regulating the suit in one suit. It certainly was necessary to set out with reference to each year's assessments, distinctly and separately, all the facts necessary to show the right to assess, levy, collect and appropriate the moneys from those assessments.

> Brown v. Board of Levee Commissioners, 50 Miss. 469.

Passing the right to assess the levee taxes, and assuming that such a right was complete when the elections

were held in the several counties, and votes cast, and counted, and returned and compared, and the result published, as prescribed in Section 5 of Act No. 19 of the year 1893 (pages 27-28), it was still necessary to follow the directions prescribed in that act, in making the assessments of the lands on which the levee taxes were to be levied, and in collecting those assessments, and in conducting the suit authorized by the act to be brought to enforce their payment.

By section 7 of the act, it was required that the lands be assessed in convenient subdivisions, as surveyed by the United States, and the assessment books were to show the names and residences of the owners of the lands, and mortgages of record on them, and a description of the lands, the number of acres cleared, as nearly as could be, and then the value of the lands as assessed without levee protection, and the value of the same lands as estimated, increased by levee protection.

Acts of 1893, p. 29.

The assessors were required (Sec. 8) to begin their assessments on the first Monday of April, and complete them by the first Tuesday of May, and then report them to the secretary of the Levee Board on or before the last mentioned day. They were then to hold a meeting at the place of business of the Levee Board on that day, after completing the assessments. They were to elect a chairman and secretary, and keep a record of their proceedings, and compare and equalize their assessments, and correct their books to conform to the equilization, and their assessments, as equalized were to be the assessment of the Levee District for that year, and until the next assessment.

Acts of 1893, pp. 29-30.

The Levee Board was then to hold its annual meeting on the same day, the second Tuesday in May, at its dom-

icile (Section 9) and seven members were to constitute a quorum for the transaction of business. The president at that meeting was to lay before the board the annual report of the chief engineer, with maps, papers and estimates accompanying it, and the last assessment showing the aggregate sum upon which a tax for levee purposes might be levied; and also a report of the treasurer of the board, showing the financial condition of the Levee District.

After an examination of the reports, the Levee Board was required to decide what work it would undertake to do during that official year, and the rate per cent. on the aggregate increased value of lands in the Levee District, that would be necessary to raise the sum sufficient to pay for such work, as provided in section 5, of the act, provided that the tax should not exceed five per cent. as proivded.

Acts of 1893, p. 30.

It is scarcely necessary to say that under the law, compliance with all the requirements of the statutes was essential to the validity of the assessment of the levee taxes, and to the right to collect them, and that all the facts showing such compliance were required to be embraced in the complaint in this suit in order to entitle the plaintiff, the Board of Directors of the St. Francis Levee District, to a decree against A. B. Ballard and Josephine W. Ballard, for the sums claimed to be due on their lands, or the sale of their lands to pay such sums.

Rector v. Board of Improvement, 50 Ark. 116.
Watkins v. Griffith, 59 Ark. 344.
Red Fork Levee District v. St. L., I. M. & S. Ry. Co. (Ark.), 96 S. W. Rep. 117.
Mulligan v. Smith, 59 Cal. 206.
Rich v. Mentz Township, 134 U. S. 634.
Zeigler v. Hopkins, 117 U. S. 683.
Merritt v. Port Chester, 71 New York 309.

Matter of Pennie, 108 N. Y. 364.
Ogden City v. Armstrong, *168 U. S. 224.*
St. Louis, I. M. & S. Ry. Co. v. Dudgeon, 64 Ark. 108.
Gibney v. Crawford, 51 Ark. 34.
Hindman v. O'Connor, 54 Ark. 627.
Morris v. Dooley, 59 Ark. 483.
Cribbs v. Benedict, 64 Ark. 569-570.
Hudson v. Jefferson County, 28 Ark. 360.

Not only were A. B. Ballard and Josephine W. Ballard entitled to have the complaint in the suit set out in language all the facts essential to show the right of the Board of Directors of the St. Francis Levee District to assess, levy, collect and dispose of the levee taxes, but they were also entitled to have the particular facts stated in the complaint, showing the particular lands they owned or claimed to own, giving the proper descriptions of them, showing that those lands had been properly assessed upon the basis prescribed in the Acts of the General Assembly, that the taxes had been properly levied on the estimated increased value of their lands, that the taxes amounted to certain sums on each tract of land, that the tax book had been delivered to the collector, that they had failed to pay these sums due as required by the statutes, that they resided, or did not reside in Crittenden County, and if they did not reside there, that they were not in the county, and that their lands had, or had not upon them occupants, and then a prayer for a personal summons as to them, or else for the public notice in the newspaper, prescribed in Act No. 71 of the Acts of 1895, so that they might be brought before the court in the manner required in the statutes.

In no other way could A. B. Ballard and Josephine W. Ballard be adequately informed even under the statutes of what was claimed in them in the suit; nor could their rights in the suit be in any other way so brought before the court as to enable the court to administer to them in the suit, upon the facts as they existed, the justice they were entitled to.

Kirby's Digest, Sec. 6091.
Games v. Stiles, 14 Peters 322, 330-332.
Stilwell v. Adams, 29 Ark. 346.
Judge Story in Bradstreet v. Neptune Ins. Co., 3 Sumner C. C. R. 601, 610, etc.
People v. Green, 55 New York 135.
Town of Mentz v. Cook, 108 New York 505, 509.
Washington R. R. v. Bradley, 10 Wallace 303.

The complaint alleged that the Board of Directors elected R. W. Barton collector of the levee taxes for Crittenden County, and that Barton as collector "on the first Monday in October, 1894, 1895, 1896 and 1897, proceeded to collect said taxes due on the lands of said Crittenden County, and that on the first Monday of October, 1894, said R. W. Barton as collector, proceeded to collect said taxes due on said lands for 1894, within said Levee District, and within the time limited by said statutes for the collection of said taxes, no taxes were paid by said defendants, nor by any one for them on their lands aforesaid, and all of said taxes on said lands of said defendants hereinbefore named in the caption to this complaint are yet wholly unpaid and are delinquent."

There was nothing further on this subject in the complaint.

Record, p. 13.

A. B. Ballard and Josephine W. Ballard or their lands were not sued for levee taxes for the year 1894, and no decree was rendered against them or their lands for levee taxes for that year, and no sale of their lands for the levee taxes for that year was made. Therefore there was no allegation in the complaint that any levee tax collector ever had the tax books containing the levee taxes on the lands of A. B. Ballard and Josephine W. Ballard for the year 1895, or 1896, or 1897, in his hands, or that he ever took any step toward collecting such taxes for

either of those years, or that the levee taxes on their lands for either of those years ever became delinquent, or were not paid when they fell due.

Following the rule established by the cases referred to, the complaint in the present suit was required to show (Acts of 1893, No. 19, Sec. 5, p. 27) that a meeting of the landowners in each county of the Levee District was held, after posting the notices prescribed, before the day fixed for the meeting, called by the directors in each county, who appointed two clerks of election. That a proposition to levy annually a tax, not exceeding 5 per cent. of the increased value or betterment, estimated to accrue from protection to be given against floods from the Mississippi River, by the levee to be constructed, on all lands within the Levee District, was submitted. That the directors and the clerks were sworn to perform their respective duties to hold the election fairly, and make returns of the election fairly, to the secretary of the Levee Board. That returns were duly made of the said election, and that the secretary, president and treasurer of the Levee Board proceeded to canvass the returns and declared the result. That it appeared from the returns that two-thirds of the land owners represented at the meetings voted for the annual assessment. That the board was satisfied that a majority of all the land owners of the Levee District was represented at the meeting. That after all this the president of the Levee Board gave notice of the fact throughout the Levee District. That the Board of Directors thereafter (Sec. 5, p. 27) assessed and levied the taxes for the years 1894, 1895, 1896 and 1897, respectively, under the authority given by the land owners at the election in 1893, or at some other election, on the increased value or betterment, estimated each year, to accrue from protection to be given against floods from the Mississippi River, by the levee to be constructed, on all lands within the Levee District. That the Board of Directors each year elected an assessor, a land owner in the Levee District, from each county in the district, who

composed a Board of Assessors for such Levee District.

Acts of 1893, Sec. 7, p. 29.

And that each assessor, for the county he represented, made each year an assessment of all the lands in the district in books provided for that purpose by the Levee Board. That the lands each year were entered upon the books of assessment in convenient subdivisions as surveyed by the United States, with appropriate columns, showing the names and residences of the owners of the lands, and mortgages of record on the lands, and also a description of the lands, and the number of acres cleared as nearly as the assessor could ascertain without measurement. The complaint *must* also show that the assessment as made each year, was (1) of the value of the land without levee protection, and (2) the value of the land as estimated, increased by levee protection.

Acts of 1893, Sec. 7.

That the assessors, respectively, made their assessments in their respective counties, beginning the first Monday in April in each year (Act of 1893, Sec. 8), and that they completed the same by the first Tuesday in May in each year (Act of 1893, Sec. 8), and reported the same to the secretary of the Levee Board on or before the second Tuesday in May in each year. (Act of 1893, Sec. 8.)

That the assessors of the respective counties, constituting the Board of Assessors, after completing their respective assessments, held a meeting at the place of business of the Levee Board, on the second Tuesday in May in each year (Acts of 1893, Sec. 8), and the president caused a notice to be published in each county, calling on all the land owners, or persons aggrieved by reason of the assessment, to appear on the day mentioned, before the Board of Assessors for the purpose of having any wrongful or erroneous assessment corrected. That

on the second Tuesday in May in each year (Acts of 1893, Sec. 9, p. 30) the assessors met at the office, or place of business of the Levee Board, and elected a chairman, and secretary, and kept a record of their proceedings. That they heard complaints made by landowners, and adjusted errors, and wrongful assessments, and compared and equalized their respective assessments, and corrected their respective books, containing the same, so as to conform to such equalization, and that the assessments for the counties, respectively, as equalized, became the assessments of the Levee District, for the purposes of taxation, for the respective years. That the Board of Directors of the St. Francis Levee District held a regular or annual meeting on the second Tuesday in May in each year, and had a quorum present, and the president laid before the Board of Directors the annual report of the chief engineer, with the maps, papers and estimates accompanying the same, and the last assessments made by the assessors of the respective counties, showing the aggregate sum upon which a tax for levee purposes might be levied, and the report of the treasurer of the Board of Directors, showing the financial condition of the Levee District. That after an examination of the said reports, the Levee Board decided what work it would undertake to do during the official year, and the rate per cent. on the aggregate increased value of lands in the Levee District, that would be necessary to raise a sum sufficient to pay for such work, as provided in Section 5 of the Act of 1893, and that thereupon the taxes sued for were assessed and levied for each year by the Board of Directors, accordingly. That the Board of Levee Directors each year elected a collector for each county, including the county of Crittenden, who was furnished by the secretary of the Board of Directors with a list of the assessments of the county of which he was collector, and that such collector proceeded on the first Monday in October in each year, to collect the assessments for Crittenden County, and that the assessments here sued for were not

paid within the thirty (30) days, and therefore, the collector in the name of the Levee Board instituted the suit in which the sales, in question here, were made.

An examination of the complaint (Record, pp. 9-13) will show that it set out very few of the essential facts. Its defects have been pointed out to some extent in presenting assignment of errors No. 4, and what is said there is referred to here.

The complaint was not entitled in the suit prescribed in the statute. That suit was to be styled, "St. Francis Levee District v. Delinquent Lands." The present suit was styled in the complaint, "Board of Directors of the St. Francis Levee District, Plaintiff, v. The Memphis Land & Timber Company, John Adams," and hundreds of other corporations and individuals, whose names followed along one after another, as defendants, without stating the residence of any one of them. This list included A. B. Ballard but not Josephine W. Ballard.

Record, p. 9.

Then followed the statement that the following named defendants were non-residents of Crittenden County, Arkansas. In this list A. B. Ballard was included, but not Josephine W. Ballard.

Record, pp. 10-11.

In neither list of names in the complaint was the name of any individual or corporation connected with any particular tract of land, nor was any one stated to own or have an interest in any particular tract. The next paragraph (Record, p. 11) changed the name of the plaintiff, and stated that "the plaintiff, the St. Francis Levee District, states," etc. This paragraph, after referring to the acts of the legislature, stated that "the following lands lying and being situated in said Levee District, said county and State, and belonging to said defendants

named in the caption of this complaint, a list of which is hereto attached, and asked to be taken as a part hereof, were duly assessed for taxation for levee purposes in the name of the said defendants, whose names are written opposite to the said tracts of land respectively, as provided by the said Acts of the General Assembly, hereinbefore referred to, and the taxes thereon being duly extended on the said tax books of said Levee District were duly returned," etc.

Record, pp. 11-12.

In the list attached, all the lands sued as delinquent in Crittenden County, were described, but there is in the present record only the list of those belonging to the parties setting up claims in the Crittenden Chancery Court, as appears in this record—that is, A. B. Ballard and Josephine W. Ballard, and Thomas H. Allen, or his assigns.

The result of not setting out a sufficient cause of action in the complaint was not merely that there was error in the Crittenden Chancery Court in rendering the decree of sale and selling the lands of A. B. Ballard and Josephine W. Ballard, which could be reversed by appeal, or on a writ of error, but that the decrees and sales were absolutely void and passed no title whatever as against them. There is a concurrence of the authorities, Federal and State, on this proposition.

Hall v. Melvin, 62 Ark. 439.
Cowling v. Nelson, 88 S. W. Rep. 914; 3 Ark. Law Rep. 381.
Collins v. Paepcke-Leicht Lumber Co., 84 S. W. Rep. 1046; 74 Ark. 81.
Railway Co. v. The State, 55 Ark. 205.
Radcliffe v. Scruggs, 46 Ark. 103.
Elsey v. Falconer, 56 Ark. 419.
Falls v. Wright, 55 Ark. 562.
King v. Chase, 15 New Hampshire 9.
Hollingsworth v. Barbour, 4 Peters 466.

Munday v. Vail, 34 New Jersey (Law) 418.
Shriver's Lessee v. Lynn, 2 Howard 57-60.

In Reynolds v. Stockton, 140 U. S. 254, the court, in passing on the validity of a judgment rendered in New York, when brought in question in New Jersey, as affected by Section 1, Article 4, of the Constitution of the United States, said:

"The requirements of that section are fulfilled, when a judgment rendered in a court of one State, which has jurisdiction of the subject matter, and of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another State."

140 U. S. 264.

And again: "If the fact of a judgment, rendered in a court of one State, does not preclude inquiry in the courts of another, as to the jurisdiction of the court, rendering the judgment, over the person or the subject matter, it certainly, also, does not preclude inquiry as to whether the judgment, so rendered, was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it."

140 U. S., p. 265.

And further: "The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigations. Its emphatic language is that a judgment to be conclusive upon the parties to the litigation must be responsive to the matters controverted."

140 U. S. 265-266.

The court referred to Mundy v. Vail, 34 N. J. Law 418, and cited and approved from the syllabus, the following:

"A decree in equity, which is entirely aside of the issue raised in the record, is invalid, and will be treated as a nullity, even in a collateral proceeding."

140 U. S. 266.

The court quoted from the opinion in the same case the essentials of a valid adjudication in a lawsuit, and then copied further, as follows:

"A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants."

140 U. S. 268-269.
See Owings v. Hull, 9 Peters 624.
Hallum v. Dickinson, 47 Ark. 124.

Finally the court said this:

"Without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings. In other words, that when a complaint tenders one cause of action, and in that suit service on the appearance of the defendant is made, a subsequent judgment therein, rendered in the absence of the defend-

ant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same State, and of course, notwithstanding the constitutional provision heretofore quoted, has no better standing in the courts of another State."

140 U. S. 270-271.
Hovey v. Elliott, 167 U. S. 409, 445-446.
Windsor v. McVeigh, 93 U. S. 282-283.

(B)

There was no sufficient affidavit made and filed to support a warning order, or order for notice to A. B. Ballard and Josephine W. Ballard.

By Act No. 71 of the Acts of 1895, any land owner residing in the county where the suit was brought, whose title papers were of record in the Recorder's office, was entitled to personal notice by summons of the suit (page 90), and any owner who was in the county, or whose land was occupied, was also entitled to personal notice (page 92), and it was only where the owner of the land was a non-resident of Crittenden County, or was unknown, that notice could be given him by publication for four weeks prior to the day of the term of the court on which final judgment might be entered for a sale of his land, in some newspaper published in the county. (Page 89.)

The clerk of the court was required to sign the notice (page 90), and he must necessarily have had some information of record, as to the fact of the residence of every alleged owner of land proceeded against, before he could issue a summons for him, or include his name in the list of the supposed owners of the lands to be made a part of the published notice, along with the description of the lands he was supposed to own, and the amounts due thereon.

Record, p. 90.

The court by the statute (page 91) was not specially required to look to or determine any question of residence of any person or corporation proceeded against as the owner of land, but only to determine whether or not the notice had been properly given. If the facts as to the residences had not previously been established *prima facie* in the suit, or even if such facts had been established *prima facie*, it still was certainly the duty of the court to inquire into those facts on the hearing, before rendering the decree of sale, and itself to determine whether or not each land owner or person having an interest in the lands proceeded against, had been brought before the court in the exact manner the law required he should be.

The legislation required that the fact of the residence of each owner of each tract of land proceeded against in the suit should be placed in the assessment (Acts of 1893, Sec. 7, p. 29), and should be brought into the record of the suit when it was begun, and in addition that it should be determined by the court on the hearing. The jurisdiction to proceed in the suit upon the notice depended on the fact of non-residence.

> 1 Greenleaf's Evidence, Secs. 483-484 and 491-493.
> County Court v. Robinson, 27 Ark. 116.
> Kirby's Digest, Sec. 1521.

Now, how should this fact of non-residence have appeared in the suit in order to authorize the clerk to sign and publish the required notice, to non-residents of the county, and the court to pass on it at the hearing?

Ordinarily a civil action is commenced in Arkansas by filing in the office of the clerk of the proper court a complaint and causing a summons to be issued thereon.

> Kirby's Digest, Sec. 6030.

The summons is not dispensed with in any case where it can be served, but only where it appears by the affidavit of the plaintiff, filed in the clerk's office at or after

the commencement of the action, that the defendant is a non-resident, or has gone out of the State, or left the county to avoid the service of a summons, or conceals himself so that the summons cannot be served.

In the last two cases—that is, where he has left the county of his residence to avoid service, or conceals himself so that a summons cannot be served—the facts may be stated in the return of a proper officer.

Upon the affidavit being filed, or upon the return, the clerk is required to make upon the complaint an order warning such defendant to appear in the action within thirty days from the time of the making of the order.

Kirby's Digest, Sec. 6055.

The warning order must be published weekly for at least four weeks.

Kirby's Digest, Sec. 6056.

The statutes cited above apply to all suits, both at law and in chancery.

The statute (Act of 1895, No. 71) provides not only that the collection of the taxes shall be enforced by chancery proceedings in a court having chancery jurisdiction, but also specially that, "said suit shall be conducted in accordance with the practice and proceedings of chancery courts in this State, except as herein otherwise provided" (page 88 and page 92), and there is no provision in the statute excepting the necessity for the filing of the affidavit.

It is true, the statute does not provide for the case of a non-resident of the State of Arkansas, but only for the case of a non-resident of Crittenden County (Acts of 1895, p. 89), yet the practice must be assimilated to the practice under the general statute, and in that view the affidavit must be filed.

This proposition has been decided in the Memphis Land and Timber Company v. The Board of Directors of St. Francis Levee District, 70 Ark. 409.

In that case the record did not show that there was any affidavit made as the foundation for the notice or the warning order against the defendants, and the court declined to hear evidence of the fact that it had been made or filed, though the offer was made to prove the loss of it out of the files, in addition to the other facts.

The court said in its opinion:

"It is said on part of appellee that in proceedings of this kind, for the collection of assessments against the land of non-residents, no affidavit for a warning order was required. But we do not concur in this statement. The statute directs that suits for the collection of these assessments 'shall be conducted in accordance with the practice and pleadings (proceedings) of chancery courts in this State,' except as therein otherwise provided. The statute then proceeds to name certain exceptions in the matter of not requiring attorneys or guardians *ad litem*, etc., but does not dispense with the necessity of an affidavit as the foundation for a warning order.

Acts of 1895, p. 88.

We conclude that an affidavit, that the defendants were non-residents of the county, was required by law as a prerequisite to the publication of a warning order against them.

As the record stands here, we must hold that the court erred in rendering a decree in this case when no affidavit for warning order was made."

70 Ark. 410-411.

This case has been repeatedly cited and approved in subsequent cases.

In the case last cited the court said:

"The complaint filed in this action is neither signed nor verified as required by the statute, and no affidavit for the warning order appears in the transcript."

70 Ark. 410.

The same is true in this case.

Record, pp. 9-14.
And see McMahan v. Smith, 69 Ark. 594.

It is true that there appears in the record what purports to be an affidavit, reading as follows:

"R. J. Williams states that he is the attorney for the plaintiff, and that the chief officers of the St. Francis Levee District are absent from Crittenden County, and that the facts stated in the foregoing complaint are true."

Record, p. 14.

The general statute requires that the affidavit of the plaintiff shall be filed in the clerk's office, before the warning order is made.

Sandels & Hill's Digest, Sec. 5679.
Kirby's Digest, Sec. 6055.

The rule is where a statute requires an affidavit, that the affidavit to be filed or used must be the exact affidavit the statute prescribes.

Beirne v. Imboden, 14 Ark. 237, 240, etc.
Marshall v. Green, 24 Ark. 411, 423-424.
Drake on Attachments, Sec. 89.
Hartely, *ex parte*, 5 Ark. 32.
Love v. McAllister, 42 Ark. 183.
Baker v. York, 65 Ark. 142.

The only exception allowed by the statute requiring the plaintiff to make the affidavit is when the party to the suit is absent from the county, or is physically unable to

attend before the court for the purpose of making the affidavit, and then the affidavit made shall state the reason for his not making it, and it may be made by an agent or attorney.

Sandels & Hill's Digest, Sec. 5749.
Kirby's Digest, Sec. 6125.

The Board of Directors of the St. Francis Levee District, or the St. Francis Levee District, could not be absent from Crittenden County, as it was a governmental agency, located by law in the territory, of which Crittenden County constituted a part. The affidavit did not state that it was absent from the county. It stated only that the chief officers "of the St. Francis Levee District are absent from Crittenden County."

The chief officers of the Levee District were not the plaintiffs in the suit. The statute, therefore, has not been complied with, and in the suit under Act No. 19 of the year 1893, and Act No. 71 of the year 1895, there can be no equivalent for what the law required with reference to the notice to be given, and a different thing cannot be substituted for that which the statute prescribed.

The permission of the statute to the agent or attorney to make the affidavit (Kirby's Digest, Sec. 6125) is, with the qualification, "unless otherwise expressed," and the language of the other section (Kirby's Digest, Sec. 6055), is "otherwise expressed" in the words, "Where it appears by the affidavit *of the plaintiff* filed in the clerk's office," clearly excluding any other affidavit for the purposes of a warning order.

Besides, the affidavit of Williams (record, p. 14) does not mention a single property owner, nor the residence of any property owner, nor state anywhere any fact indicating that it was intended to be the affidavit on which the order for notice, or a warning order in the suit, was to be based. It does not refer to a single defendant

named in the caption of the complaint, nor mention A. B. Ballard or Josephine W. Ballard.

The Board of Directors of the St. Francis Levee District, or the Levee District, is the creature of the Acts of the General Assembly, and has only the powers and rights given it by those acts, and if those acts did not authorize it to have the affidavit for the warning order or notice made and filed with the clerk, upon the filing of the complaint in the suit for the levee taxes, it was not left without remedy, but under the general statute (Sandels & Hill's Digest, Sec. 5680, and Kirby's Digest, Sec. 6056), providing, "The court may make the warning order upon the requisite facts being satisfactorily shown by affidavit, or other proof," it could have resorted to other proof, and have procured the necessary order from the court before publishing the notice to non-residents of the county, the Act No. 71 of the year 1895, required to be published in a newspaper.

A distinction was thus taken between the clerk and the court with reference to the proof or evidence on which to base a warning order, or order for notice.

The General Assembly saw proper to require the affidavit of the plaintiff in the suit, except in the cases specially excepted and specified. It is well known that fraudulent uses have been made of the power to bring absent parties into courts in suits.

The general statutes refer to persons and not to such creations as the Board of Directors of the St. Francis Levee District, in prescribing the affidavit required.

It may be that there should be a legislative provision covering its case, or the case of the State, or a county, or other corporations. But to enact such statute is the province of the legislature. Whether the General Assembly could have put into Act No. 19 of the year 1893, or Act No. 71 of the year 1895, a provision changing the general

statutes only for the purposes of the suit they provide for is a serious question. It did not do so. And the courts have no power to supply defects in legislation.

The statute, Act No. 71 of the Acts of 1895, prescribed the style of the suit authorized to be brought as "St. Francis Levee District v. Delinquent Lands."

Acts of 1895, p. 89.

The suit here was styled in the caption of the complaint (record, p. 9), and in the decree of sale of the 14th of February, 1898 (record, p. 14), "Board of Directors of the St. Francis Levee District, Plaintiff, v. The Memphis Land and Timber Company," and others named as defendants. So the suit authorized, and the suit begun, were different suits. But treating the reference in the affidavit of Williams to the complaint as making the complaint a part of the affidavit, and the statements of fact properly in the two as all sworn to by Williams, was there in them enough to constitute the affidavit required as the basis for a warning order, or notice of the suit?

The complaint in a suit must contain the style of the action, consisting of the names of the parties to it, distinguishing them as plaintiffs and defendants, and state the facts constituting the plaintiff's cause of action.

Sandels & Hill's Digest, Sec. 5715.
Kirby's Digest, Sec. 6091.
Nordman v. Craighead, 27 Ark. 369.

Under the statute there must be a statement of the facts constituting the title of the plaintiff, and also of the facts constituting the title or interest of the defendant sued; that is, the facts subjecting him to be sued, and showing what he is sued for. But is anything more properly a part of the complaint?

In this case the complaint must show "in ordinary and concise language" just what lands A. B. Ballard and

Josephine W. Ballard owned, and how they were liable for the levee taxes, and the amount claimed to be due from them, or "the complaint does not state facts sufficient to constitute a cause of action," as against them, and may be demurred to as the statute (Sandels & Hill's Digest, Sec. 5717, Kirby's Digest, Sec. 6093) provides.

The statute does not require a statement in the complaint of the residences of the plaintiffs, or the defendants.

Sandels & Hill's Digest, Sec. 5715; and
Kirby's Digest, Sec. 6091.
Fort v. Hundley, 5 Ark. 179.

And where the defendant is a non-resident, the fact must be brought into the case according to the statute, not by a statement in the complaint, but by "the affidavit of the plaintiff, filed in the clerk's office, at or after the commencement of the action."

Sandels & Hill's Digest, Sec. 5679.
Kirby's Digest, Sec. 6055.

In Gray v. Trapnall, 23 Ark. 510, it was decided that whatever may be the statements in the bill, the affidavit prescribed by the statute to procure an order of publication as against non-resident defendants is necessary to the prosecution of a suit against unknown heirs.

In McMahan v. Smith, 69 Ark. 591, it was decided that under the Statute (Sandels & Hill's Digest, Sec. 5681, Kirby's Digest, Sec. 6057), a separate affidavit filed in the suit could not take the place of a statement in the complaint that the names of the heirs of a designated person were unknown to the plaintiff, and that an order for such unknown heirs to appear in the suit as defendants could not be based on such separate affidavit, in the absence of the required statement in the complaint, and was of no force.

In Sannoner v. Jacobson, 47 Ark. 31, only an affidavit for an order of attachment in the course of a suit, made under the statute (Sandels & Hill's Digest, Sec. 325, Kirby's Digest, Sec. 345) was in question. The ground of attachment was not the non-residence of the defendant, but a different ground. The statute provided that such affidavit might be amended as to the grounds of attachment "up to and until final judgment upon the same."

Sandels & Hill's Digest, Sec. 331.
Kirby's Digest, Sec. 350.

Before the Civil Code (1868) the writ of attachment in Arkansas was original process and the beginning of a suit, and defeating the attachment where the writ was not served on the defendant personally, was defeating the suit, because the process was jurisdictional.

Gould's Digest (1858), Ch. 17.
Gibson v. Wilson, 5 Ark. 422.
Childress v. Fowler, 9 Ark. 159.
Edmondson v. Carnall, 17 Ark. 284.
Rheubottom v. Sadler, 19 Ark. 493.
Edwards v. Cooper, 28 Ark. 466, 470, etc.
Hellman v. Fowler, 24 Ark. 235.
Field v. Dortch, 34 Ark. 399, 403-405.
Richmond v. Duncan, 4 Ark. 198-199.
Halliday v. Cohen, 34 Ark. 712.

Under the Civil Code the order of attachment is only interlocutory process, or a proceeding in the course of the suit.

See Cole v. Cunningham, 133 U. S. 115-116.
Kirby's Digest, Secs. 412-424.
Halliday v. Cohen, 34 Ark. 713, etc.

In Sannoner v. Jacobson there was a contest among the attaching creditors of the common debtor as to the priority of their respective orders for attachments, made by intervention of one of such creditors in the suit of another.

The court held that the intervening creditor could not dispute the grounds of the attachment in the place of the debtor, but could avail himself only of imperfections which were unamendable and rendered the proceeding void.

The court decided these propositions:

1 There can be no attachment without a complaint.

2. Properly the affidavit for attachment should be distinct from the complaint, but both might be included in one paper.

3. That if only the affidavit was filed it would be sufficient for both complaint and affidavit if it contained all the essentials of both.

4. That an affidavit for an attachment must be positive, and if made on belief, the attachment would be quashed.

5. But as the affidavit was amendable, it was not void, and in the contest between the plaintiff in the suit, and the intervenor in the suit, would be treated as amended, and therefore unassailable.

We have no fault to find with a single one of the propositions. The subsequent cases—Lehman v. Lowman, 50 Ark. 444, and Landfair v. Lowman, 50 Ark. 446; Fortenheim v. Claflin, 47 Ark. 49; Blass v. Lee, 55 Ark. 329; Hanger v. Ives, 69 Ark. 52, and Salmon v. Mills, 49 Fed. Rep. 333—have gone no further than Sannoner v. Jacobson. And they are in accordance with the rule in Rushton v. Aspinall (Douglass 679), 1 Smith Leading Cases, Part 2 (8th Am. Edn.), top page 1445, and notes. And see Ormsty v. Ottman, 85 Fed. Rep. 492, and Wilson v. Teague, 95 Kentucky 47.

It is to be noted that it was not decided in Sannoner v. Jacobson that the complaint may dispense with the affidavit, but only that the affidavit may dispense with the complaint. But see McMahon v. Smith, 69 Ark. 591.

Treating the affidavit of Williams, and the complaint as one, what did Williams swear to in the affidavit, connecting A. B. Ballard and Josephine W. Ballard with the suit, or showing their respective residences, or that personally they were not in Crittenden County, or the particular tracts of land they owned, or in which they were supposed to have an interest, or that there were no occupants on the lands?

Josephine W. Ballard was not named anywhere in the complaint, or in the list of lands and persons owning or having interests in them, alleged to be attached to the complaint, and asked to be taken as a part of it.

Record, pp. 9-14.

After naming the defendants who were non-residents of Crittenden County (record, p. 10) the complaint stated that the lands in the list which was attached to it, and asked to be taken as a part of it, belonged "to said defendants named in the caption of this complaint," without distinguishing or separating any owner of any tract of land from the other owners, or one tract of land from another tract of land.

Record, p. 11.

In the list of owners and lands attached to the complaint there was no positive statement that any particular defendant, or any particular person, owned or had any interest in any particular tract of land. All that was said with reference to A. B. Ballard and was, after giving a supposed description of a tract of land: "Assessed to A. B. Ballard."

Record, p. 12.

It is a well known fact that lands may be assessed, for the purpose of general taxation, in the name of one person and belong to another. In fact, the court below (record, p. 83), in this very case, said that it was immaterial that the lands in controversy were the property of Mrs.

Josephine W. Ballard, and she was not made a party defendant in the suit, to enforce the collection of the taxes thereon, and that that fact did not affect the decree of sale, or the sale.

And see Merrick & Fenno v. Hutt, 15 Ark. 331.

There was nothing more in the complaint showing or tending to show that A. B. Ballard owned or had any interest in those particular tracts of land, or in any tract of land. And in this connection nothing was said as to his place of residence.

The Act of 1895, in providing for the notice in case the ownership of any of the delinquent lands is unknown, declared: "And where the owners are unknown, that fact shall be stated in said published notice." And the notice is to be given by publication where they are non-residents of the county.

Acts of 1895, pp. 88-89 and 90.

Now, how could any such fact of unknown ownership, or of non-residence of the county, be stated in any published notice, if it had not previously been stated in the complaint filed under oath, or in a separate affidavit filed in the suit?

It has been repeatedly decided, and is a self-evident proposition, that parties in interest in the subject matter of a suit, whose names or residences are not known, and who cannot be served with process to bring them before the court in the suit, cannot be brought in by publication, or a constructive notice, unless the fact is alleged, and is *prima facie* established in the suit that they, or their names, are unknown, or their residences cannot be ascertained after inquiry. Is the rule different with reference to non-residents of the county?

Greenstreet v. Thornton, 60 Ark. 373-374.
Webster v. Reid, 11 Howard 459-460.

Hollingsworth v. Barbour, 4 Peters 477, etc.
Pana v. Bowler, 107 U. S. 544-546.
Hall v. Melvin, 62 Ark. 444-445.
McMahan v. Smith, 69 Ark. 592.

It is to be noticed that by the statute (Acts of 1895, p. 89), the notice of the pendency of the suit must be given "when such suit may be (is) pending."

The suit, therefore, must be complete in itself by the filing of the complaint, and the issuing of the summons, or at least by the filing of the complaint, and the making of the order for the notice, or the preparation of the notice, before the notice can be published.

Kirby's Digest, Secs. 6033 and 6055.
Burleson v. McDermott, 57 Ark. 229.
Railway Co. v. Shelton, 57 Ark. 459.
Wilkins v. Worthen, 62 Ark. 406-407.

Can it be said truthfully that Williams made an affidavit that A. B. Ballard and Josephine W. Ballard were non-residents of Crittenden County, or were not personally therein; and that they were the owners of, or were interested in, the lands in controversy in this suit, and that there were no occupants on the land, so as to authorize a publication of the notice prescribed in the statute (Acts of 1895, pp. 89-90), to them, as persons having an interest in the said lands, that the suit was pending in the Chancery Court of Crittenden County, to enforce the collection of certain levee taxes on such lands, which lands were in a subjoined list, each supposed owner's lands being set opposite to his or her name, together with the amounts severally due from each?

The affidavit must have contained the facts mentioned to authorize the publication in a newspaper of a notice to A. B. Ballard and Josephine W. Ballard that they were required by law to appear and make defense to the suit, or the same would be taken for confessed, and judgment final entered directing the sale of their lands for

the purpose of collecting the said delinquent levee taxes, and the payment of the interest, penalty and costs allowed by law.

There was no object in giving them notice of the suit unless their interest in it was shown in the notice, and the notice could not go outside what was contained in the record of the suit, when it was given, because, as Eakin, Judge, said in Pillow v. Sentell: "The warning order is of no consequence whilst the pleadings disclose no interest in the subject matter in any of the non-residents."

39 Ark. 64.

The case of Johnson v. Hunter, 127 Fed. Rep. 219, opinion by Trieber, District Judge, involved the very decree under which the sale of the lands of A. B. Ballard and Josephine W. Ballard were made.

The positions stated above were all taken in that case, and all overruled in that opinion. But on appeal from the decree, the Circuit Court of Appeals for the Eighth Circuit overruled it, and reversed the decree, and fully sustained the positions so overruled and held the decree and sale void.

The last opinion has not been reported yet, but will be before this court on the hearing.

(C)

There was no sufficient proof of the publication of any warning order or notice to A. B. Ballard and Josephine W. Ballard filed or produced in the Chancery Court of Crittenden county, when the decree of sale of their lands was rendered.

The record shows no notice at all, and the only pretense of notice is found in the recital in the decree of sale of the 14th of February, 1898, that several hundred persons

or corporations named, including among them A. B. Ballard, but not Josephine W. Ballard, "were severally, constructively, summoned by publication in a newspaper published in Crittenden County, Arkansas, weekly, for four weeks before this day, proof of which has previously been filed herein." The record shows, by containing no such proof, that the recital was not true.

Record, pp. 15-16.
Brodie v. Skelton, 11 Ark. 131.
Coons v. Throckmorton, 25 Ark. 61.

It was decided in Kimball v. Merrick, 20 Ark. 12, which was an action on a judgment rendered in a court of Massachusetts against the defendant who was sued on the judgment in a Circuit Court of Arkansas, that the recital in the record brought from Massachusetts that the defendant had appeared at a previous term, was not sufficient evidence of an appearance to warrant a judgment by default in the suit in Massachusetts, and the judgment rendered there was denied effect in Arkansas by the Supreme Court of Arkansas.

The exact facts were that the judgment sued on was rendered on January 14, 1851, against the defendant, who appeared in the record to have been sued as a non-resident of the State of Massachusetts. It recited that the action was entered at the June term, 1849, when the defendant appeared; and thence the cause had been continued from term to term to that time, and then the plaintiffs appeared, but the defendant did not, and thereupon he was called and a judgment by default was entered against him. And see—

Brodie v. Skelton, 11 Ark. 130-131.
Games v. Stiles, 14 Peters 330, Etc.

The difference in substance between the recital of the record in the present case, as to the proof of the service of the warning order, from the recital in the record from

Massachusetts, is not perceived. Each simply stated a pre-existing fact, and not a fact transpiring in court when the record was made. The notice, if given, as we have elsewhere shown, was returnable during the January term, 1898, of the Crittenden Chancery Court, and the 14th day of February, 1898, the day on which the decree of sale was rendered, was some week or ten days after the January term of the court had ended.

Act No. 71 of the Acts of 1895, declared in words: "That notice of the pendency of such suit shall be given as against non-residents of the county * * * by publication weekly for four weeks * * * in some newspaper published in the county where the suit is pending," and then prescribed the form of the notice.

Acts of 1895, pp. 89-90.

And then in regulating the trial in the suit, provided:

"And in all cases where notice has been properly given, as aforesaid, * * * the court, by its decree, shall grant the relief as prayed in the complaint."

Acts of 1895, p. 91.

It is manifest from these statutory provisions: (1) That the notice was to be in writing in the prescribed form, and was to be given in the manner and for the time prescribed in the statutes; and (2) that the court, before rendering any decree in the suit, was to have the notice before it, and first decide the question whether or not it had been properly given, as required by the statute.

Now, how was the court to know what the notice contained if it did not see it? And how could it see the notice if it as not in the record?

And how was the court to know how often, and when, and in what particular manner it had been published, or

in what newspaper, unless evidence of those facts in some form was produced before it on the hearing in the suit before rendering the decree?

The statutes provided (Acts of 1895, p. 92): "Said suit shall be conducted in accordance with the practice and proceedings of Chancery Courts in this State, except as herein otherwise provided," and there was no exception in the statute making it unnecessary to make proof in the ordinary way of the publication of the notice in the suit.

The provisions of the general statute as to constructive service apply to Chancery Courts as well as to all other courts.

Kirby's Digest, Secs. 6055-6059.

The proof of the publication of warning orders, or notice constituting constructive service is regulated by general statutes contained in Chapter 99 of Kirby's Digest, Secs. 4919-4926.

By that law the proof of the publication of all advertisements and orders of publication, and notices, required by law, or the order of any court to be published in any newspaper, is to be made by the affidavit of the editor, proprietor, manager, or chief accountant of the newspaper, filed in the suit, with a copy of the writing annexed, stating the number of times, and the dates of the paper in which the pub ication was made.

Kirby's Digest, Sec. 4924.

As the Acts, No. 19, of the year 1893, and No. 71 of the year 1895, prescribe no particular proof of the giving of the notice, and adopt chancery proceedings for the suit, the general statutes on the subject govern.

Gallagher v. Johnson, 65 Ark. 90.
Board of Directors of St. Francis Levee District v. The Memphis Land & Timber Co., 70 Ark. 410.

In Saffold v. Saffold, 14 Ark. 408, the court established the rule which has been adhered to ever since, that the fact of the publication of constructive notice, when authorized by a statute, must be established by the evidence the statute prescribes, and that there can be no substitute for such prescribed proof.

And see Brodie v. Skelton, 11 Ark. 120.
Clark v. Strong, 13 Ark. 491.
Gibney v. Crawford, 51 Ark. 34.
Cross v. Wilson, 52 Ark. 312.
Martin v. Allard, 55 Ark. 218.
Logan v. East Arkansas Land Co., 68 Ark. 448.

In the very recent case of Beidler v. Beidler, 71 Ark. 318, the court emphasized this doctrine, saying: "This court has repeatedly held that a compliance with provisions like this (Sandels & Hill's Digest, Sec. 5679; Kirby's Digest, Sec. 6055) is an essential prerequisite to the publication of a warning order, without which no jurisdiction as to such defendants can be acquired, and all proceedings as to them are void.

Gregory v. Bartlett, 55 Ark. 30.
Memphis Land & Timber Co. v. Board of Directors of St. Francis Levee District, 70 Ark. 409.
McMahan v. Smith, 69 Ark. 591.

No warning order was made by the clerk upon the complaint in this suit, and the decree of the court as to W. J. Foster is void."

71 Ark. 322.

The rule adopted at the beginning of the State of Arkansas, with reference to the sufficiency of service of a summons, in an action, was that the officer executing it, in making his return of service, must conform to the regulations given in the statute prescribing the manner of the service, and must show with reasonable certainty, the time, place and manner of the service, and the name of

the person or party upon whom it was made, so that it might appear to the court in which the suit was, that the service was made in conformity with the provisions of the statute upon the person or party named in the writ, and in the proper manner, and at a proper time, and within the jurisdiction of the court.

Gilbreath v. Kuykendall, 1 Ark. 52-53.
McKnight v. Smith, 5 Ark. 410.
Welch v. Welch, 16 Ark. 527.
Nevada Co. v. Williams, 72 Ark. 397.
Cross, *Ex Parte*, 7 Ark. 44.
City of Fort Smith v. Dodson, 51 Ark. 447.
Rose v. Ford, 2 Ark. 26.

In early cases, it was also held that the presumption of jurisdiction attached only when it was affimatively shown by the record that the court had acquired jurisdiction over the person of the defendant in the manner prescribed by law.

Rutherford v. The State Bank, 3 Ark. 558.
Wise v. Yell, 7 Ark. 11.
Gibson, *Ex Parte*, 10 Ark. 572.
Gregory v. Bartlett, 55 Ark. 30.
McKnight v. Smith, 5 Ark. 411.

In the later case of Davis v. Whittaker, 38 Ark. 435, the record failed to show any summons, or the service of any summons, and the court said it might well hold that there was a fatal defect of parties.

It continued: "Where there has been service, the record should show it. Where there has been none, it should show an appearance. And where there are several defendants, it does not suffice to say that the 'defendants' appeared. Such a term applies only to those who have already, by service or appearance, been made parties, and does not include all who are named in the bill or complaint. It is better to name the parties defendant who come by attorney, at least once, after which the

term 'defendants' in subsequent entries may include them."

38 Ark. 438. And see
Havens v. Sherman, 42 Barbour (N. Y.) 636.

Where the record shows the actual issuance of a summons and the putting of it in the hands of the sheriff, or where it shows the proper affidavit, and the making of the proper warning order by the court, or the clerk, the service of summons in the one case, and the fact of publication in the other, has in certain cases, and especially after a long lapse of time, been presumed in support of the judgment or decree, when brought in question collaterally.

Thus in Boyd v. Roane, 49 Ark. 398, the record showed a summons had been issued against infants, and that the court had appointed a guardian *ad litem* for them. The decree of foreclosure recited that the parties came by their respective attorneys, and that it was made by consent. The court presumed the service of process, and that the guardian *ad litem* appeared for them after the service.

49 Ark. 409.

In Love v. Kaufman, 72 Ark. 265, the complaint contained an indorsement, "filed March 12, 1900, and writ signed," with the signature of the clerk of the court thereto. There was a judgment by default, and the defendants appealed to the Supreme Court. The appellant contended that the record did not show any service of summons, or that the court had jurisdiction over the person. The decree recited that the defendant was duly served with summons, as required by law. The court presumed, as the summons had been issued, and the record showed that the defendants afterwards appeared, that the summons had been served.

But we have not been able to find any case where the issuance or the personal service of summons was presumed, where it had not been shown by the record that the summons had in fact been issued. Nor have we found a single case where publication of notice to an absent or non-resident defendant, or constructive service upon him, was presumed, where the record failed to show that the court, or the clerk made an order in fact for notice or constructive service and required its publication.

In Applegate v. Lexington & Carter Co. Mining Co., Justice Woods, delivering the opinion, at the conclusion, said:

"The result of the authorities, and what we decide, is that where a court of general jurisdiction is authorized in a proceeding, either statutory or at law, or in equity to bring in by publication, or other substituted service, non-resident defendants, interested in, or having a lien upon property, lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court *orders* such substituted service, it will be presumed in favor of the jurisdiction that service was made *as ordered*, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid."

117 U. S. 270-271.

It will be noticed that the opinion emphasized the fact that, "the court ordered such substituted service." In such case the presumption (especially after a long lapse of time) is indulged that the service was made.

See, also: Voorhees v. Bank of U. S., 10 Peters 469, 471.
Foster v. Givins, 67 Fed. Rep. 690, 692-693.
Eltonhead v. Allen, 119 Fed. Rep. 126, 129.
Koons v. Bryson, 69 Fed. Rep. 277, 301.

The point was made plainer in the opinion, where Justice Woods took the distinction between the case before the court, and Galpin v. Page, saying after the statement copied above: "Galpin v. Page, 18 Wallace 350, cited by counsel for defendant, is not in conflict with this proposition. The judgment set up on the one side and attacked on the order in that case *was rendered on service by publication.* The law permitted *service* to be made *by publication* only where certain facts were made to appear to the satisfaction of the court, and the court *by a precedent order,* which must necessarily *appear of record,* authorized service to be made by publication. But the *record showed no such order,* and the publication, therefore, was the unauthorized act of the party, *and appeared affirmatively* to be invalid and ineffectual."

117 U. S. 271.

The provisions contained in both the Act No. 19 of the year 1893, and No. 71 of the year 1895, that the suit authorized be brought in a court having chancery jurisdiction, and be conducted in accordance with the practice and proceedings of chancery courts, in the absence of any provision to the contrary in either of the acts, were sufficient to require service of process upon, or notice to, the owners of the lands, or those having interests in the lands proceeded against, as defendants, in the suit to recover the levee taxes.

From the organization of the Chancery Court in England, as a court separate from the courts of common law, that court in every suit required the service of process upon, or the giving of personal notice to the defendant in the suit, or the parties to be affected by the proceedings and decrees, and declined absolutely to proceed with the suit as against any absent party who had not been served with process, or had not been given notice of the suit.

Innovations upon that rule have been made by statutes, but the rule where no statute makes a provision to the contrary is still recognized there.

Under the first Constitution of Arkansas (1836), Article 6, Section 6 (which is the same as Section 15, Article 7, of the present Constitution), the courts held that chancery jurisdiction was vested in the circuit courts (courts of chancery not then being established), and that such jurisdiction was to be exercised in all cases where adequate relief could not be had at law, and that the proceedings should be according to the rules, usages and practice of courts of chancery, except where there might be some other provision by law.

Bentley v. Dillard, 6 Ark. 79.
Hempstead v. Watkins, 6 Ark. 317, 356, etc.
Kennedy, *Ex Parte*, 11 Ark. 598.

The Revised Statutes of the State, which was its first authorized collection of the Acts of its Legislature, contained a chapter regulating the bringing and conducting of suits in chancery, and that chapter, with the additions made to it by legislation, may be found in Gould's Digest of the Statutes (1858, Chapter 28), which contains the last authorized compilation of the statutes of the State preceding the adoption of the Civil Code, which went into force in the year 1868. That Code, in substance, abolished chancery jurisdiction, considered separately, and required all suits to be brought and conducted in the Circuit Court, in the same form, with the qualification that the Circuit Court was to exercise the jurisdiction formerly belonging to chancery courts, but in the method prescribed in the statutes, where they had changed or modified the former practice.

By the statutes regulating chancery jurisdiction and practice, before the Code, the suit was begun by filing a bill, or petition, and then regularly a supena was issued, commanding the sheriff to summon the defendant. Service of that subpena was made by giving the defendant a copy, or leaving it at his usual place of abode, with a designated person, and telling him the contents. If there were unknown heirs, they might be proceeded against

without naming them as defendants, or if the defendant was a non-resident of the State, he might be proceeded against as such.

In such cases personal service of process was dispensed with, but in each case an affidavit of the facts was to be filed in the suit. As to unknown heirs, the court was authorized to make such an order as to notice as it deemed proper. As against a non-resident, the court or the clerk made an order to be published, directed to him, notifying him of the pendency of the suit, and requiring him to appear on a day named and make defense, allowing sufficient time for publication, or the bill would be taken for confessed. If the sheriff made return on the subpena, that the defendant could not be found, then, also, the order for notice might be made. The time and manner of the publication of the notice were prescribed.

By declaring that the suit provided for should be conducted in accordance with the practice of chancery courts in the State (Act of 1895, Sec. 2, page 92), it was recognized that there was an established chancery practice, and conformity to it necessarily required the service of process, or the giving of notice as prescribed in that practice.

This proposition was recognized in Carson v. The Board of Directors of the St. Francis Levee District, 59 Ark. pp. 535-536.

And see:

Memphis Land and Timber Co. v. Board of Directors of St. Francis Levee Dist., 70 Ark. 410.
Banks v. Board of Directors of St. Francis Levee Dist., 66 Ark. 492.

But Act No. 71 of the Acts of 1895, by its specific provisions, removed any doubt on this subject.

It was held in County of San Mateo v. Southern Pacific R. R. Co. (the Railroad Tax Cases), 13 Fed. Rep. 722

(opinion by Justice Field), that the Fourteenth Amendment to the Constitution imposes a limitation upon the exercise of all the powers of the State, which can touch the individual or his property, including among them that of taxation, and the law enacted must direct, and there must be some kind of notice to the owner and an opportunity to him to be heard, before he can be deprived of his property directly, or a charge or liability can be created upon it, which may be the basis of taking it, whether the proceeding is judicial or administrative. (Pages 750-753.)

> And see Black on Tax Titles (1st Ed.), Sec. 42, and Blackwell on Tax Titles (2d Ed.), Chap. 12, p. 213, etc.

The attempt of the court below to distinguish the overdue tax act (Acts of Arkansas, 1881, No. 39, p. 63) from the Act No. 71 of the Acts of Arkansas of 1895, p. 88, in question here, with respect to the necessity of the order for the notice, or the notice of the suit appearing of record in the suit, in view of the provisions of the general statutes, and the principles of law to which we have called attention, cannot be sustained.

The provision in Section 2 of the Act of 1881 (Acts of 1881, p. 65) that the clerk of the court on the filing of the complaint should enter on the record the order for notice of the suit, was no more peremptory or mandatory than the provisions in the Act of 1895 that "notice of the pendency of such suit shall be given as against non-residents of the county and unknown owners, respectively, when such suits may be pending, by publication weekly, for four weeks * * * in some newspaper published in the county," and then prescribing the form of the notice, which must necessarily have been in writing, and prescribing in the notice the style of the suit, namely, "St. Francis Levee District v. Delinquent Lands, Notice," and then, as a part of the form, leaving a blank for the signature of the clerk, and under that blank

placing the words "Clerk of said Court," and having the notice state in the body of it that a suit was pending in the designated court, to enforce the collection of certain levee taxes, and that the list of the lands was subjoined, and each supposed owner's name was set opposite his or her lands, with the amounts severally due from each. And the provisions just stated are reinforced by the further provisions (page 90) that the suit should stand for trial at the first term after the complaint was filed as to non-residents of the county, and unknown owners, only if the four weeks of publication in a newspaper had expired before the first day of the term, or during the term of the court to which the suit was brought, and the final provision limiting the power of the court to decree the sale of the land as prayed in the complaint (page 91) to "cases where notice has been properly given, as aforesaid," unless the owner appeared and filed an answer.

The court below, in its opinion (record, p. 83), stated that the act under which the proceedings were instituted does not require a warning order to be entered on the record, or the complaint, and if it did, that the proceedings could not be attacked collaterally, unless such entry was made jurisdictional, as it was in the case of Gregory v. Bartlett, 55 Ark. 30, and that that was not done in this case, citing Clay v. Bilby, 78 S. W. Rep. 749, and 72 Ark., p. 101.

We will present here only the question whether the order for the notice, or the notice of the suit, was required by the law to be entered of record in the suit, as the other question has been presented in another place.

The court speaks of a "warning order" as if the notice required by Act No. 71 of the Acts of 1895 was an ordinary warning order. It is necessary only to read that act, and then the statutes regulating the constructive service of process (Kirby's Digest, Secs. 6055-6059)) to see that the two are entirely distinct, and the one does not contain what the other does.

In Arkansas the order of publication for an absent or non-resident is technically termed a "warning order," and it is so designated in the statutes, and is an order made by the clerk upon the complaint, warning the defendant to appear in the action within thirty days from the making of the order, and nothing more. That such an order, and the affidavit on which it is based, are *not* required to be entered on the record of the suit, no one would insist, as the courts have repeatedly decided the contrary, as shown elsewhere, and the statutes so declare.

The court, therefore, could not have meant that an ordinary warning order need *not* be put of record, but intended to designate the notice required by Act No. 71 of the Acts of 1895 as "a warning order." It is to be observed that the statute did not give the notice that name, and prescribed for it requisites wholly outside any ordinary warning order.

The statute creates courts of record, and among them designates chancery courts.

Sandels & Hill's Digest, Sec. 1289.
Kirby's Digest, Sec. 1513.

It declares that full entries of the orders and proceedings of all courts of record of each day shall be read in open court on the morning of the succeeding day, except on the last day of the term, when the minutes shall be read and signed at the rising of the court.

Sandels & Hill's Digest, Sec. 1295.
Kirby's Digest, Sec. 1519.

A court of record is defined to be: That where the acts and judicial proceedings are enrolled, or recorded for a perpetual memorial and testimony, which rolls are called records of the court, and are of such high and supereminent authority that their truth is not to be called in question. For it is the settled rule and maxim, that nothing shall be averred against the record, nor shall any

plea, nor even proof, be admitted to the contrary, and if the existence of a record be denied, it shall be tried by nothing but itself—that is, upon bare inspection, whether there be any such record or no—else there would be no end of disputes. But if there appear any mistake of the clerk in making up such record, the court will direct him to amend it.

3 Blackstone's Commentaries, *p. 24.
11 Cyclopedia of Law & Procedure, p. 657, etc.
Hahn v. Kelly, 34 Cal. 42, etc.; 94 Am. Decisions, 742.

Hahn v. Kelly is not in accordance with the rulings in Galpin v. Page. It was one of the cases cited before this court on the argument of Galpin v. Page, and its doctrine, so far as it is inconsistent with Galpin v. Page, was overruled.

The record is a history of the most material proceedings in the cause, entered formerly on a parchment roll (but now ordinarily on paper), and continued down to the present time, in which must be stated the writ of summons, all the pleadings, the declaration, plea, replication, rejoinder, and whatever further proceedings have been had—all entered *verbatim* on the roll, and also the issue or demurrer and joinder therein.

3 Blackstone's Commentaries, *p. 317.

All orders of the court not entered of record are extra judicial and void. And where a court consists of several judges, a transcript of the record should show that there were justices enough to constitute a court, and therefore, having authority to make or cause to be made, a record of the court.

11 Cyclopedia of Law & Procedure, p. 762, etc.
Medlin v. Platte Co., 8 Mo. 235, 40 Am. Decisions 135.

The statute of Arkansas from the beginning of the State has been that "all writs, process proceedings and records in any court shall be in the English language, except that the proper and known name of process, and technical words may be expressed in the language heretofore and now commonly used, and shall be made out on paper or parchment, in a fair and legible character, in words at length, and not abbreviated, but such abbreviations as are now commonly used in the English language may be used, and numbers may be expressed in Arabic figures with Roman numerals in the customary way."

Sandels & Hill's Digest, Sec. 1297.
Kirby's Digest, Sec. 1521.

In Lenox v. Pike, 2 Ark. 14, the court decided that whatever proceedings, or facts the law or the practice of the courts require to be enrolled, constitute and form a part of the record, such as all judicial writs and process, the finding of the jury, the judgment of the court, and the like.

2 Ark. 20.

In Rose v. Rose, 9 Ark. 507, it was held that depositions filed in a chancery cause and read in evidence, constitute a part of the record in the cause, without being made so by bill of exceptions. (Pages 512-513.)

In Lemay v. Johnson, 35 Ark. 225, 230, the court held that all papers properly filed in an equity cause become parts of the record.

In Floyd v. McDaniel, 36 Ark. 484, it was held that depositions and other papers on file are parts of the record of a chancery cause, as well as the pleadings.

In Casteel v. Casteel, 38 Ark. 477, it was held that under the present system, every paper properly filed in a chancery cause, becomes a part of the record.

If it was not necessary to file the proof of the publication of the notice in the suit, why did the court in its decree of sale of the 14th of February, 1898 (Record, p. 16), recite as a fact *that proof* that the non-resident defendants "were constructively summoned by publication in a newspaper published in Crittenden County, Arkansas, weekly for four weeks before that day * * * had previously been filed herein?" Was the filing necessary, or only an idle ceremony?

The proof not appearing in the record, the recital of the court could not supply its place.

Pillow v. Sentelle, 39 Ark. 61.
Lusk v. Perkins, 48 Ark. 239.
Nevada County v. Williams, 72 Ark. 397.

Now, would it not be anomalous, and indeed unprecedented, if the legislature intended that no record should be made in the suit of the notice, after prescribing the essentials of it, with the particularity appearing in the statute, and especially prescribing that the giving of it should be a condition precedent to the decree?

What is the difference or distinction in character, or effect, from a legal standpoint, with reference to notice of the suit, to the parties to be affected by the sale to be made under it, between the suit provided for in the overdue tax act of 1881, and the suit provided for in Act No. 71 of the Acts of 1895? We can see none.

And if the rights of the owners of the lands proceeded against in the suit provided for in the former act required the order for the notice, and the notice published to be made a part of the record of the suit, it is certainly true that the rights of the owners of the lands proceeded against in the suit provided for by the latter, required also, that the order for the notice, and the notice, should be put of record.

In McCarter v. Neil, 50 Ark. 191, Justice Smith stated, that the authority "over the landowner was acquired by

the filing of the complaint, stating that taxes were due on the particular tract, and by the publication of the required notice, which took the place of ordinary process to bring the parties into court."

In Gregory v. Bartlett, 55 Ark. 30, the court held that the court acquired no jurisdiction of the land proceeded against, and that its proceedings were void, although the proper order had been published in a newspaper, as required, because the clerk had failed to enter the order on the record, before publishing it. In this connection the court said: "The statute under consideration, required the order which authorized the publication, to appear of record. There is no evidence of it in the transcript, which purports to be a complete record of the proceedings in the over-due tax case. As the statutes require the order to appear of record, and it does not, no presumptions in its favor are indulged."

55 Ark. 36.

When this court came to consider a similar case from Arkansas, in Dick v. Foraker, 155 U. S. 404, it followed the decision in Gregory v. Barlett, and quoted largely from the opinion, and held the statutory notice, required by the overdue tax act of 1881, in proceedings for the fixing of tax liens for unpaid taxes upon lands, and the sale of the lands for the payment of them was essential, and that the court could take no jurisdiction of the suit until the notice was given and that all its proceedings in the suit in the absence of the required notice, were void.

In Pope v. Campbell, 70 Ark. 307, an overdue tax sale was in question, and the proper order for the notice to be published had been entered by the clerk upon the record, but instead of putting it upon the record of the proceedings of the court when sitting as a chancery court, he put the entry in the record of the same court when proceeding as a court of law, and the court held the order void, and the publication of the order made under it void,

and that the court had proceeded in the suit without jurisdiction.

It has already been shown by reference to the statute, that a suit is not ordinarily commenced in Arkansas until the filing of the complaint, and the issuing of a writ of summons. The early cases held, and it has been followed in the later cases, that the suit was not begun until the filing of the declaration at law, or the bill in chancery, and the issuing of the summons, or where constructive service was resorted to as against absent or non-resident defendants, until the order for notice had in fact been made, and had been published as required by the statute.

State Bank v. Cason, 10 Ark. 479.
Montgomery v. Birge, 31 Ark. 493.
Hale v. Warner, 36 Ark. 221.

Clay v. Bilby, 78 S. W. Rep. 749, and 72 Ark. 101, was an attack upon a sale made under a decree in an overdue tax suit, brought under Act No. 39 of the year 1881, Acts of Arkansas of 1881, p. 65. The defects in the complaint are pointed out in the opinion (72 Ark. 104-106), and among them, that the land was sold on the 17th day of May, 1883, in the suit, and that the suit brought to set aside the sale was commenced on the 14th day of April, 1899, lacking one month and three days of being sixteen years after the sale was made. The complaint attacked the decree under which the sale had been made only on the ground that the affidavit filed, to prove the publication of the notice in the suit, was not made by the publisher of the newspaper in which the notice was published, and it did not state that the newspaper was printed in the county, or that it had a *bona fide* circulation therein for the period required before the first publication.

72 Ark., pp. 104-106.

It is to be noticed that the affidavit objected to, was not an affidavit required to be filed at or before the beginning

of the suit, to obtain jurisdiction, or an affidavit required as the basis for the notice to be published, or given of the suit, but was an affidavit to prove the service, or publication of the required notice, after the suit had been begun, and when it was pending, and therefore, was only a step or proceeding in the suit, of which the court already had jurisdiction. See

Webster v. Daniel, 47 Ark. 142, etc.
Gregory v. Bartlett, 55 Ark. 35.

The case of Gallagher v. Johnson, 65 Ark. 90, had decided, in a suit similar to Clay v. Bilby: (1) That the proof of the publication of the notice was regulated by the general statutes on the subject; and (2) that the sale under the decree for the overdue taxes was null and void, because the proof of the publication of the notice was insufficient to give the court jurisdiction in the overdue tax suit, the insufficiency consisting only in the fact that the affidavit filed failed to state that the newspaper had the required circulation.

In Clay v. Bilby, Gallagher v. Johnson was overruled on the second point decided in that case—that is, the insufficiency of the affidavit to support the decree, and no doubt correctly as the case presented, was not one where no affidavit at all had been made, but only where an affidavit had been made which in certain particulars was not the affidavit required by the statute, but in other respects stated the necessary facts and was not an affidavit on which the notice of the suit had been based.

A distinction has frequently been taken between the total want of any affidavit, where an affidavit is required before the commencement of a suit, or special proceeding, or as the foundation of a notice to an absent or non-resident party of the bringing of the suit, and an affidavit to be filed after the beginning of the suit, and when it is pending, required as the basis for the progress or further prosecution of the suit, which is merely defective

in some particular, but contains in other respects, substantially, the facts required. In the one class of cases, it has been held that the jurisdiction is defeated, or never attached; while in the other—that is, where there is only a defect in the affidavit filed in the course of the suit—the defect has been treated merely as an irregularity, and as amendable, and as not defeating, or preventing the attaching of the jurisdiction.

The distinction we take appears in the following cases, and others referred to elsewhere:

Edmondson v. Carnall, 17 Ark. 284.
Hellman v. Fowler, 24 Ark. 235.
Williams v. Skipwith, 34 Ark. 529.
Byers v. Fowler, 12 Ark. 271-272.
Sannoner v. Jacobson, 47 Ark. 31.
Ormsby v. Ottman, 85 Fed. Rep. 492.

Justice Field noticed it in Pennoyer v. Neff, 95 U. S. 720-721.

The case of Clay v. Bilby might very well have been put solely upon the ground of the defects in the complaint, and the great lapse of time between the rendition of the decree, and the bringing of the suit making the attack upon it, especially in view of the statute regulating the suit which provided: "The strict rules of law relating to the jurisdiction of courts in special statutory proceedings shall not be applied to proceedings under this act, but all presumption shall be in favor of the jurisdiction of the courts in which they are had, and of their regularity in all respects."

Acts of Arkansas of 1881, p. 72.
Williams v. Bennett, 75 Ark. 312.

The only point before the court in Clay v. Bilby, outside the defects in the complaint, and the long lapse of time since the rendition of the decree attacked, was the defect in the affidavit filed, to prove the publication of

the notice in the suit in which the decree had been rendered, and the court virtually confined its decision to that question, announcing finally: "Our conclusion is that the defect in the affidavit made to prove the publication of the warning order in this case, was a mere irregularity, which did not affect the jurisdiction of the court, or the validity of the decree in question."

72 Ark. 113.

It is difficult to understand what the court meant by the statement in Clay v. Bilby, that "In Gallagher v. Johnson, 65 Ark. 90, a doctrine not in harmony with previous rulings of this court was announced" (72 Ark. 109), when in the same volume of reports, there were the cases of Baker v. York, 65 Ark. 143, Miller Co. v. Gazola, 65 Ark. 353, and a decision by the same court and the same judge—Thompson v. Scanlan (1891), 16 S. W. Rep. 197—all, if we understand them, substantially supporting the doctrine announced in Gallagher v. Johnson, and overruled in Clay v. Bilby, but neither of them noticed in the latter opinion.

And see Saffold v. Saffold, 14 Ark. 408, decided as early as the year 1854.

Lawrence v. The State, 30 Ark. 719.
Pillow v. Sentelle, 39 Ark. 61.

(D)

The decree of sale does not state, and the record does not show the facts essential to the validity of the decree of sale, as against A. B. Ballard and Josephine W. Ballard, or their lands, and thereby they have been denied the benefit of the laws of the State of Arkansas, applicable to the facts of their case, in violation of the Constitution of the United States, whereby they have been deprived of their property without due process of law.

That the suit authorized by the two acts of the General Asembly, Act No. 19 of the year 1893, and Act No. 71

of the year 1895, and the suit shown by this record, is not an ordinary suit at law, or an ordinary suit in equity, but is a statutory, special and summary proceeding out of the usual course, depending wholly for validity upon the authority of the two acts of the General Assembly, is a proposition which will be assumed here, and will not be argued further in this connection.

The principle established by the decisions, is that where the jurisdiction is special and limited, or the proceeding is summary, and not according to the usual or ordinary course, and the defendant is brought into the court, in the suit or proceeding, by the constructive service of process, or a published notice only, and enters no personal appearance, the judgment or decree pronounced does not bind him at all, personally, nor does it bind his property, or affect his rights, unless the court has obtained possession of the property it undertakes to control, or dispose of, nor even then unless every requisite prescribed in the particular statute, authorizing the suit, or proceeding, with reference to the property proceeded against, not only existed in fact, but is recited in the judgment or decree, or is shown elsewhere in the record of the suit, or proceeding to have existed, or to have been true.

In Galpin v. Page, 18 Wallace 350,, Justice Field, first stated the presumptions which attach to the proceedings of a Superior Court of general jurisdiction, proceeding within the general scope of its powers, where nothing appears in its record to the contrary and stated the exception where the record states the evidence of the jurisdiction, or makes an averment with reference to it, which shows that jurisdiction did not exist, and the further exception that the presumptions as to jurisdiction are not indulged in, even as to Superior Courts of general jurisdiction, with reference to persons who appear in the record not to have been within the jurisdiction of the court, or subject to its process, nor as to proceedings

which are not in accordance with the course of the common law, and the necessity that there should be a strict and literal compliance with the statutory provisions, when by the legislation of a State, constructive service of process by publication is substituted for personal citation and then referred to the case of Morse v. Presby, 5 Foster (N. H.) 302, and quoted from it as follows:

"A court of general jurisdiction may have special and summary powers wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject matter of the judgment, and as to the persons to be affected by it, must appear by the record, and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it."

After making the quotation, Justice Field said: "The qualification here made, that the special powers conferred are not exercised according to the course of the common law, is important. When the special powers conferred are brought into action, according to the course of that law—that is, in the usual form of common law and chancery proceedings, by regular process, and personal service, where a personal judgment or decree is asked, or by seizure, or attachment of property, where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court, as in cases falling within its general powers."

Such is the purport of the language and decision of this court in Harvey v. Tyler, 2 Wallace 332. But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction, upon

the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."

18 Wallace 371.

In Gibney v. Crawford, 51 Ark. 34, the court quoted and adopted the substance of what we have quoted from Justice Field's opinion, 51 Ark. 39-40.

And see further:

Trice v. Crittenden Co., 7 Ark. 159.
Hudson v. Jefferson Co., 28 Ark. 362.
Bush v. Visant, 40 Ark. 130-132.
Lusk v. Perkins, 48 Ark. 239, 246.
Cross v. Wilson, 52 Ark. 312.
Morris v. Dooley, 59 Ark. 486-489.
Games v. Stiles, 14 Peters 322, 328, etc.
Earley v. Doe, 16 Howard, 618-619.
Ransom v. Williams, 2 Wallace, 318-319.
Deputron v. Young, 134 U. S. 256-257.
Guaranty Trust Co. v. Green Cove R. R. Co., 139 U. S. 147-148.
Thatcher v. Powell, 6 Wheaton, 119.
Sabariego v. Maverick, 124 U. S. 292-296.
Williams v. Peyton, 4 Wheaton 77.
McClung v. Ross, 5 Wheaton 116.
Cissell v. Pulaski Co., 10 Fed. Rep. 893.

In Hogins v. Brashears, 13 Ark. 242, the land was sold for taxes on a day different from that prescribed in the statute for such sales. The County Court had power upon good cause shown to fix another day for the sale. The deed made by the collector, under the sale made, did not recite that the County Court had fixed any day for the sale. The deed was held not competent evidence to sustain the title of the purchaser in his suit to recover the land.

In that case the court, after recognizing its duty to uphold tax titles by every liberal intendment consistent

with the rules of law, said: "Nevertheless, we have no authority to depart from these rules of law in order to sustain any pretended sale of property by a collector of taxes under color of his office beyond the true boundary of his authority. And this, in reference to the sale of lands, is no general authority to sell, but only to sell such lands as are liable by law to be sold for taxes; and these only in the manner prescribed by law. And thus he may not only pass his defined boundary in the act of selling, but in the mode of the act; and when he does so, his acts, although under color of authority, are in law but the private acts of a private person. The party, who sets up title, must furnish the evidence necessary to support it. When, for this purpose, he relies upon a tax collector's grant, whose authority is not general but limited, as we have seen, both in its scope and in the mode of its exercise, to sustain its operative force as such, he must exhibit all the substantial prerequisites to his authority to make the grant. Because it is alone from these substantial prerequisites, that the authority to make the grant can spring, and beyond their pale it can have no vitality. Hence the rule in such cases of authority, whether entrusted to an officer or to an individual, that it must be strictly pursued and strictly proved. And hence, too, the obligation upon one setting up such a grant to show the performance of these substantial prerequisites, nothing being presumed as to their performance. Nor has any legislature changed these general rules of law as to tax collector's authority, otherwise than in prescribing the mode in which the performance of these prerequisite acts shall be shown by recitals to be contained in the deed prescribed, and declaring its effect, when so executed, both as an operative grant and as an instrument of evidence to sustain its operation as such. And, having done so, has left no ground to presume that any other mode of sale and grant was intended to be set on foot or provided for, for lands sold for taxes by the tax collectors. When tested by these principles,

the recitals contained in the alleged deed in question, after allowing every aid that can be afforded them by the liberal provisions of the statute above quoted, fall far short of a statement of all the substantial prerequisites of the tax collector's authority to sell and convey the land in question. And to this extent at least, the recitals in such a deed must be regarded as one of its essential elements."

13 Ark. 250-251.

These rules have never been overturned, but have been recognized in great numbers of cases.

The decree of sale of the 14th of February, 1898, in question, therefore, was not *prima facie* valid with reference to the sales involved here, but was defective and insufficient in not expressly finding and determining in substance the following facts:

(1) That A. B. Ballard and Josephine W. Ballard, or some of the other defendants claimed (Acts of 1895, p. 88) and were shown by the complaint to be the owners of or interested in the lands in controversy here, decreed to be sold, and that the court gave judgment against them for the amounts of the levee taxes, and interest and penalties and costs, for that reason.

(2) That A. B. Ballard and Josephine W. Ballard, or some of the other defendants were shown in the complaint, and by an affidavit duly sworn to and filed in the suit, to be, and that the fact was they were non-residents of Crittenden County, and that they were not to be found therein, and that there was no occupant of any of the tracts of land.

(3) That the clerk of the Chancery Court had made upon the complaint, or elsewhere of record in the suit, or else the court had made a warning order, or an order for the giving of the notice to the defendants in the suit

for the levee taxes, and among them to A. B. Ballard and Josephine W. Ballard, as prescribed in Act No. 71 of the Acts of the year 1895.

(4) That notice of the pendency of the suit for the levee taxes had been properly given, as against the defendants therein warned or notified, and among them, as against A. B. Ballard and Josephine W. Ballard, as non-residents of Crittenden County, when the suit was pending, or after it had been brought, by publication weekly, for four weeks, prior to the 14th day of February, 1898, when the decree was entered, for the sales of the lands here sued for, as the lands of A. B. Ballard and Josephine W. Ballard, in some newspaper giving its name, or style, published in Crittenden County, as required by the statute, Act No. 71 of the Acts of the year 1895, and that due proof of that fact, as required by law, had been made and filed in the suit.

(5) That such notice so published in the suit was in the form and contained the substance prescribed in the Statute, Section 1, Act No. 71, of the Acts of the year 1895.

(6) That A. B. Ballard and Josephine W. Ballard were included in the notice as published in the suit, and were thereby notified as persons having or claiming an interest in the lands which were decreed to be sold, that the suit was pending in the Chancery Court of Crittenden County, to enforce the collection of the levee taxes on their lands, the numbers thereof being set opposite their names in the notice as published, together with the amounts severally due from them for the taxes, penalties, interest and costs on such lands.

(7) That the notice as published in the suit, concluded, as was required by the statute, and that thereby A. B. Ballard and Josephine W. Ballard were notified that they were required by law to appear and make

defense to the suit, or the same would be taken for confessed, and judgment final would be entered directing the sale of their lands for the purpose of collecting the delinquent levee taxes, together with the interest, penalties and costs allowed by law.

(8) That the complaint in the suit had been filed and four weeks thereafter had expired as to A. B. Ballard and Josephine W. Ballard, who were non-residents of Crittenden County, before the first day of the then term of the Chancery Court, or else before the 14th day of February, 1898, when the suit was tried as to A. B. Ballard and Josephine W. Ballard's lands, and the decree of sale entered.

(9) That on the hearing in the suit, before the decree of sale was entered, A. B. Ballard and Josephine W. Ballard, being non-residents of Crittenden County, and not having been personally served with process in the suit, and not having appeared therein, the allegations of the complaint had been established as to them, or their lands, by proof then heard, which the court deemed sufficient for the purpose, thereby excluding the idea that such allegations had been taken *pro confesso*.

Our position is that the two acts of the General Assembly, No. 19 of the Acts of 1893, and No. 71 of the Acts of 1895, and the Constitution of the United States, and the Constitution of Arkansas, required the court to find that all the facts, contained in the propositions just stated, existed, before pronouncing the decree of sale in the suit for the levee taxes, or proceeding to sell the lands of A. B. Ballard and Josephine W. Ballard, and such being the case, also required that the decree of sale should state that all such facts were found by the court to be true, and that the court not having done so, such decree was void, and the sales and deeds made under them are void.

McDermott v. Scully, 27 Ark. 226.
Thompson v. Scanlan (Ark.), 16 S. W. Rep. 197.
Little v. Herndon, 10 Wallace 26.
Williams v. Skipwith, 34 Ark. 529.

VI.

The ninth assignment of errors is that the decree of the 14th of February, 1898, under which the lands of A. B. Ballard and Josephine W. Ballard were sold to Hunter and Hackler, was rendered in violation of the laws of Arkansas, without proof or evidence to support the allegations of the complaint, as against them and their lands. They were persons before the court only by the constructive service of process, and the decree *pro confesso*, entered in the suit, on which the decree of sale was based, was not authorized by law, and so the decree of sale was rendered without due process of law, and in violation of the Constitution of the United States.

The statement as to notice, and as to the failure of the defendants to appear, in the record of the decree of sale (and the only statement on the subject in the record), follows the names of a great many persons, designated as defendants, and among them A. B. Ballard (but not Josephine W. Ballard), and it is as stated in the decree (Record, pp. 15-16), that they "were severally constructively summoned by publication in a newspaper published in Crittenden County, Arkansas, weekly, for four weeks before this day, proof of which has been previously filed herein, and all of the above named defendants, except A. H. Chatfield, the Memphis Land & Timber Company, and the Arkansas Land Company, having failed to plead, answer or demur to the complaint of the plaintiff, the court on motion of the attorney for the plaintiff, awards a decree *pro confesso* as to them, in favor of the plaintiff for the amount of the taxes, interest, penalty and costs due for their said lands." Then follows the hearing of the case as to A. H. Chatfield, and the other

defendants named, who had appeared and answered, and then the general decree against each of the defendants, in favor of the Board of Directors of the St. Francis Levee District, for the amount of the taxes, interest, penalty and costs assessed, levied and extended against the lands belonging to each, respectively, for the years 1893, 1894, 1895, 1896 and 1897, according to a list and tabulated statement, which the decree contains.

Record, pp. 17-18.

The only provision in the legislation, seeming to authorize an order *pro confesso* in the suit is in the form of the notice prescribed in Act No. 71 of the Acts of 1895, page 90, which prescribes that the persons and corporations are to be notified that they are required to make defense, or the suit will be taken for confessed, and judgment final entered, directing the sale of their lands for the purpose of collecting the delinquent levee taxes, interest, penalty and costs.

Taking this statement in the form of the notice, in connection with the direction to the court (page 91), that "in all cases where notice has been properly given as aforesaid, and where no answer has been filed * * * the court by its decree shall grant the relief as prayed in the complaint, and shall direct said commissioner to sell the lands described in the decree;" perhaps the act undertook to authorize the order *pro confesso*, and to dispense with evidence of the facts on which the suit was based.

Treating the provisions of the act as having that effect, we insist they and the order *pro confesso* are absolutely void as to A. B. Ballard and Josephine W. Ballard.

It appears from the decree of sale that the court treated the order *pro confesso* as conclusive of the facts on which the right to the decree of sale depended, and

without further hearing or further evidence, ordered the sale of the lands of A. B. Ballard and Josephine W. Ballard, and directed the commissioner to proceed and make the sale. And it must be conceded that if the order *pro confesso* was properly entered, and the case made in the complaint, and by the subsequent record were sufficient to justify the decree, that the order *pro confesso* was a sufficient basis for it.

Gordon v. Church, 11 Ark. 118.
Rose v. Woodruff, 4 Johnson's Chy. 547.
Thompson v. Wooster, 114 U. S. 104.

The right to enter the order *pro confesso* depended on the fact that the notice required had been given of the suit to A. B. Ballard and Josephine W. Ballard, and we have already argued that they had no such notice.

The effect of the order *pro confesso* depended on the sufficiency of the complaint taken in connection with the notice. They were required to set out substantially all the facts requisite to entitle the plaintiff to the decree of sale.

We have already argued that the complaint and notice did not contain the essential allegations required to support the suit, and authorize the decree. Assuming our positions to be true here, then the rule is established by the decisions, that the bill or pleading taken for confessed, to authorize a decree, must state all the facts necessary to entitle the plaintiff to the decree; especially in cases where the defendant has been brought before the court only by a published notice, or the constructive service of process. And the court can indulge no presumptions or inferences in support of the decree, but if the case made out in the pleading confessed does not authorize the decree, the decree is simply void.

Brodie v. Skelton, 11 Ark. 132.

Meux v. Anthony, 11 Ark. 424-425.
Fullerton v. Houpt, 12 Ark. 399.
Clark v. Strong, 13 Ark. 491.
Saffold v. Saffold, 14 Ark. 408.
Chaffin v. McFadden, 41 Ark. 42.
Railway Co. v. The State, 58 Ark. 39.
Cross v. Wilson, 52 Ark. 312.
Shriver's Lessee v. Lynn, 2 Howard 57-60.
Geary v. Sheridan, 8 Vesey 192.
Thomson v. Wooster, 114 U. S. 111-114.
Rose v. Woodruff, 4 Johnson's Chy. 546.

We go further and insist that the attempt made in the Act No. 71 of the year 1895, and in the present suit, to make the order *pro confesso* and the decree based on it conclusive against A. B. Ballard and Josephine W. Ballard (if the act bears the construction we have conceded for the purposes of the present argument), is void and without effect as to A. B. Ballard and Josephine W. Ballard, because in effect the act and the suit have undertaken to deprive them of their property without due process of law, and have denied to them within the State of Arkansas, the equal protection of the laws.

The general statute of Arkansas is as follows:

"The statements of the complaint as against a defendant constructively summoned, and who has not appeared, except such as are for his benefit, shall not be taken as true, but are to be established by proof.

Sandels & Hill's Digest, Sec. 5876.
Kirby's Digest, Sec. 6253.

The provision in Act No. 71 of the year 1895, on the subject of testimony (Acts of 1895, p. 92) is: "Said suit shall be conducted in accordance with the practice and proceedings of Chancery Courts, except that neither attorneys, nor guardians *ad litem*, nor any provision of Section 5877 of Sandels & Hill's Digest of the Statutes

of Arkansas, shall be required, and except that the suits may be disposed of on oral testimony, as in ordinary suits at law."

There is no express exception of Section 5876, of Sandels & Hill's Digest, or of its provisions by the act. See

Memphis Land & Timber Co. v. Board of Directors of St. Francis Levee District, 70 Ark. 410.

In Henry v. Blackburn, 32 Ark. 445, the Supreme Court held that it was the duty of the court below, in cases where the defendant was brought in by constructive service of process, to see that the complaint showed a cause of action within its jurisdiction, and necessarily, also, to see that the facts alleged in the complaint, to support the cause of action, were established by the proof, and that the former practice, which had prevailed, of taking decrees *pro confesso*, against a defendant served by publication of notice, and failing to appear, was not permissible under the present statute.

32 Ark. 448-450.
Bonner v. Little, 38 Ark. 401.
Welch v. Welch, 16 Ark. 527.
Games v. Stiles, 14 Peters, 330-332.

The Constitution of Arkansas provides (Article 2, Section 8), that no person shall be deprived of life, liberty, or property, without due process of law and (Article 4, Section 21) that no person shall be disseized of his estate, freehold, liberties, or privileges, or in any manner deprived of his property, except by the judgment of his peers, or the law of the land; and (Article 4, Section 22) that the right of property is before and higher than any constitutional sanction, and that private property shall not be taken, appropriated, or damaged for public use without just compensation therefor; and (Article 5, Section 24) that in all cases where a general law can be made applicable, no special law shall be enacted, and

that the operation of any general law shall not be suspended by the legislature for the benefit of any particular individual, corporation or association.

In the face of these provisions, and of Section 2, Article 4, of the Constitution of the United States, and the provisions of the 14th Amendment to that Constitution, it certainly cannot be maintained that the General Assembly of Arkansas, by Act No. 71 of the year 1895, involved here, as is claimed on behalf of Hunter and Hackler, could lawfully authorize the special suit provided for, and alter or change, as has been attempted there the general laws applicable to the conduct of that suit, considered as an ordinary suit in a court of law, or in a court of equity, and prescribe for it rules of evidence, different from the rules in other suits, and give an effect to the evidence, not given in other suits, or create evidence against A. B. Ballard and Josephine W. Ballard, in the suit against them, or their lands, which evidence would not be evidence against other persons, similarly situated in other ordinary suits, and then, in addition, cut off or destroy their right or remedy for defense to the suit, or against the enforcement of the decrees pronounced in it—they all the time being without notice of the suit, and non-residents of the State of Arkansas, and citizens, respectively, of Georgia and Florida. See—

Martin v. Barbour, 34 Fed. Rep. 701; and 140 U. S. 634.
Cunnius v. Reading School District, 198 U. S. 476-477.
Crowell v. Barham, 57 Ark. 195.

In the case of the Cairo & Fulton R. R. Co. v. Parks, 32 Ark. 131, the court after determining that the sale for the taxes involved there was void, and that the purchaser by his purchase acquired no title, considered the question, whether or not the purchaser was protected from

attack by the statute making the tax deed containing recitals proof of the facts necessary to make his purchase valid, or rather by the statute making the deed, without the recitals, proof of all the necessary facts—that is, whether or not the former owner was estopped by the tax deed, or its recitals, from attacking the title of the purchaser at the sale for taxes, for want of conformity to the requirements of the law.

The act of March 25, 1871, in question there, is to be found in substance in Gantt's Digest, Section 5206, and made the deed of the County Clerk acknowledged and recorded in the recorder's office, conclusive (amended now, Kirby's Digest, Sec. 7104, to be *prima facie*) evidence that each and every act and thing required to be done by the law had been complied with in making the sale for the taxes, and allowed such deed to be overcome only by proving (1) that the land was not subject to taxation; (2) that the taxes had been paid; (3) that the land had been redeemed before the execution of the deed; or (4) that the land was the property of a *feme covert*, an insane person, a minor, or a person in confinement at the time the sale was made and the deed executed.

See 32 Ark. 141, etc.

The court determined that the legislature had no power to make tax deeds, or the recitals in them, conclusive evidence of the facts recited, and that the furthest it could go was to make such deeds, or recitals, *prima facie* evidence of those facts, leaving parties in interest at liberty, when controversies arose, depending on those facts and involving their rights, to contradict the deed, or its recitals by other evidence. And see

Marx v. Hanthorn, 148 U. S. 172.
Turpin v. Lemon, 187 U. S. 59.

In Radcliffe v. Scruggs, 46 Ark. 97, Sec. 138 of the Act of April 8, 1869, was in question. It provided in

substance that all actions to test the validity of any proceeding in the appraisement, assessment, or levying of taxes, upon any land or lot, and all proceedings whereby is sought to be shown, any irregularity of any officer, or defect, or neglect thereof, having any duty to perform, under the provisions of the statute, in the assessment, appraisement, levying of taxes, or in the sale of lands, or lots, delinquent for taxes, or proceedings, whereby it is sought to avoid any sale under the provisions of the statute, for irregularity, or neglect of any kind, by any officer having any duty or thing to perform, under the provisions of the statute, shall be commenced within two years from the date of the sale, and not afterwards.

See Kirby's Digest, Sec. 7114.

The court held that the legislature could not enact a statute which will transfer one man's land to another under the guise of a tax sale for non-payment of taxes, when there had been no assesment or levy of taxes. Nor could the legislature prescribe any period within which the owner of the land must make his objections for such fundamental defects—he remaining in possession, and being in the case supposed, in no default for not paying his taxes.

It held further that the legislature has power to cure any illegality or irregularity in a tax sale, which consists in a mere failure to observe some requirement imposed, not by the Constitution, but by the legislature itself, and the non-observance of which does not deprive the former owner of any substantial right; and that the legislature may limit the time within which objections for such failure must be made, or be barred.

In Townsend v. Martin, 55 Ark. 192, the court declared that the rule announced in Radcliffe v. Scruggs was one upon which property rights were annually based—which should be finally settled, and that the court should decline

to disturb the rule, or even enter into a consideration of the question whether it was well founded or not.

55 Ark. 198-199.

It then announced that rule to be: That the statute under consideration in Radcliffe v. Scruggs, should not be construed to cut off any meritorious defense to a tax deed, such as a failure to publish notice of the sale for the full term required by the statute, prescribing such notice.

In Cooper v. Freeman Lumber Co., 61 Ark. 36, a sale of land for taxes, and for a clerk's fee of 25 cents for a certificate of purchase, and another fee of ten cents for transferring the tract on the books to the name of the purchaser, which were illegal charges, was held to be void, because of such illegal charges.

After referring to the Cairo & Fulton R. R. Co. v. Parks, and Radcliffe v. Scruggs, and quoting from the opinion in the latter case, the court said:

"Can it be doubted—in fact, is it not very clear—that to sell a landowners land for an amount not due upon it, and never levied upon it, and which, if levied, was unlawfully levied, has a direct tendency to injuriously affect his interest, and the power of the officer to sell for nonpayment? It is obvious that the defenses against the tax sale in this case are meritorious, as that term is defined in Radcliffe v. Scruggs, and by the weight of authority, and that the legislature cannot deprive the property owner of such defenses without in the language of Mr. Justice Smith, 'transcending the boundaries of its power.'"

61 Ark. 41.

And see:

Logan v. Eastern Arkansas Land Co., 68 Ark. 248.

In Alexander v. Gordon, 101 Fed. Rep. 92, the statute of Arkansas provided that no action to recover lands sold for taxes, or their possession, should be maintained, unless it appeared that the plaintiff, or those he claimed under was seized or possessed of the lands within two years next before suit brought. The sale for taxes was void, because (1) the list of delinquent lands and the notice of the sale was not recorded by the county clerk (Kirby's Digest, Sec. 7086); and (2) the sale was made for taxes levied in excess of the limit prescribed by law, wherefore the officer making the sale was without jurisdiction or authority to make it. The purchaser had possesion for two years, claiming under the tax sale.

The court held that such possession, under the statute, could not operate to deprive the former owner of his lands, or the right to recover possession of them in the suit, as such a construction of the statute would make it an arbitrary enactment, depriving such owner of his property without due process of law.

In the course of the opinion, Sanborn, Circuit Judge, said that the real question involved was whether one who holds possession of land for two years under a sale clearly void upon the face of the proceedings, evidencing it, might thereby deprive the owner of the land of his title to it under the statute, without a trial, hearing or notice. He said, while it was difficult and unwise to undertook accurately to define "due process of law," such process must be a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. It must be appropriate to the case, and just to the party affected. It must give to the parties affected, an opportunity to be heard respecting the justice of the disposition of the title it seeks to divest. It is plain that the legislature cannot enact that the property of "A" shall become the property of "B."

After having made these statements, the judge proceeded:

"It is undoubtedly competent for the legislative department to enact reasonable statutes of limitation, to provide that the adverse possession of lands for a reasonable time, under a tax or judicial sale shall cure mere irregularities in the proceedings upon which it rests. But a provision that the possession of land for the limited term of two years under a purchase at a tax sale, which clearly appears upon its face to be void, because the officer who made it had no jurisdiction or authority to effect it, and because it was made for taxes levied in excess of the limit prescribed by law, is not process of law, but is a mere legislative *fiat*, and in violation of the fundamental principle of our jurisprudence. If this was the purpose and intent of the legislature of Arkansas in the passage of this act of limitation, the law could not be sustained." 101 Fed. Rep. 96-97. And see:

Caldwell v. Barrett, 71 Ark. 310.
Bagley v. Casteel, 42 Ark. 77.
Files v. Fuller, 44 Ark. 273.
Shaw v. Hill, 46 Ark. 333.
Thweatt v. Howard, 68 Ark. 431-432.
Dash v. Van Kleeck, 7 Johnson (N. Y.) 477, 508, etc.
Denny v. Mattoon, 2 Allen (Mass.) 361, 380.
Greenough v. Greenough, 11 Penn. St. 489, 495.
Groesbeck v. Seely, 13 Mich. 330.
Pryor v. Downey, 50 Cal. 388.
Martin v. Snowden, 18 Grattan (Va.) 100.
Bannon v. Burnes, 39 Fed. Rep. 893.
Black on Tax Titles (1st Ed.), Sec. 253.
Cooley on Taxation (1st Ed.), Chap. 15, 355-356.
Cooley's Constitutional Limitations (6th Ed.), 452-453.

There is no difference in substance between taking the property of A. B. Ballard and Josephine W. Ballard in this suit under the form of a decree, or order *pro con-*

fesso against them, or establishing the facts on which the suit is based against them without proof or evidence, and without allegations in the complaint supporting such decree, and taking such property under color of a deed, falsely reciting facts which they are not permitted to contradict, or taking their property by holding it adversely to them for a limited time under the color of a deed passing no title and void on its face. They were absent from the State, it is true, but they were living in their own homes in Georgia and Florida, and guilty of no default or dereliction of duty in being there. They did not know of the suit, and had no notice of it enabling them to make any defense to it. The people who conducted the suit made up the record, and are now seeking the benefit of that record to shield themselves, or those taking title under what they have done, against facts which existed, and which show, when before the court, that the suit was unlawfully begun, unlawfully conducted, and unlawfully ended, in the decree of sale of the 14th of February, 1898, whereby their property was ordered to be sold, and the title to be passed— the whole proceeding taking only the time between the 21st of December, 1897, and the 14th of February, 1898.

Memphis, Tenn., Oct. 5, 1906.

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,
Of Counsel for A. B. Ballard and Josephine W. Ballard.

APPENDIX.

ACT XIX.

AN ACT TO LAY OFF AND ESTABLISH THAT PART OF THE ST. FRANCIS BASIN LYING WITHIN THE STATE OF ARKANSAS INTO A LEVEE DISTRICT, AND FOR PROTECTING AND MAINTAINING THE SAME, AND TO INCORPORATE A BOARD OF LEVEE DIRECTORS FOR SAID DISTRICT, AND FOR OTHER PURPOSES.

Section 1, as amended by Act No. LXXV. of the same session of the General Assembly (Acts of 1893, p. 119), prescribed (1) the boundaries of the Basin created as the Levee District; (2) it named the individuals who were appointed Levee Directors for each county within the Levee District, and the terms of office of each person. It then declared as follows: "The directors herein named and their successors in office shall constitute and are hereby declared to be a body politic and incorporated by the name and style of the Board of Directors of the St. Francis Levee District, and by that name may sue and be sued, plead and be impleaded, and have perpetual succession for the purposes hereinafter designated. They may have a common seal, and may make such by-laws and regulations, from time to time, as they may deem proper, not inconsistent with this charter and the laws of this State, for the purpose of carrying into effect the objects of their incorporation. They may appoint all officers and agents, which they deem necessary and suitable in the conduct of the business of said corporation, and may do all other acts and things not inconsistent

with the laws of this State, which may be proper to carry into effect the purposes and objects of this act."

Section 3 authorized the governor to appoint one levee director annually for each county.

Section 4 authorized the Board of Levee Directors to levee the St. Francis front in Arkansas, and to protect and maintain the same, and, in order to do so, to rebuild and repair or raise levees on the right bank of the Mississippi River and such other places as the board might select, and authorized the board to employ all necessary agents, and also to determine the crown, height, slopes and grade of the levee, and make all needful regulations, and to do all acts in their opinion necessary to secure the Levee District under their charge from overflow from the waters of the Mississippi River.

"Section 5. That for the purpose of building, repairing and maintaining the levee aforesaid, and for carrying into effect the objects and purposes of this act, the Board of Levee Directors shall have the power, and it is hereby made their duty, to assess and levy annually a tax not exceeding five per cent. of the increased value or betterment estimated to accrue from protection given against floods from the Mississippi River by said levee, on all lands within said Levee District. Provided, that said Board of Directors shall call a meeting of the land owners in each of the respective counties within said Levee District in each county, by posting notices of the time and place of said several meetings, in ten conspicuous places in each county ten days before the day fixed for the meeting, at which time the proposition to levy said annual assessment shall be submitted to said land owners, and if a majority of all the land owners in such Levee District shall appear at said meeting, in person or by their legal proxies, and two-thirds of these shall vote for such assessment, it shall then be the duty of said Board of

Directors to levy said tax. Said meeting shall be held by said directors in each county, who shall appoint two clerks of election; the said directors and clerks shall perform their respective duties under oath to hold the election fairly and to make returns of the election fairly to the secretary of said Levee Board, who shall, with the president and treasurer of said board, proceed to canvass the returns and declare the result, and if it shall appear from the returns that two-thirds of the land owners represented at said meeting voted for said annual assessment, and if the said board shall be satisfied that a majority of all the land owners of said district were represented at said meeting, then the said president of said board shall give notice of the fact throughout the said Levee District, and the tax shall be levied as hereinafter provided, and the annual levy of said five (5) per cent. shall continue as long as it is found to be necessary to accomplish the object of this act, and when no longer needed, the president shall notify the assessor and direct him not to assess for this purpose. Provided further, that if the estimated cost of construction of said levee shall exceed 2 per cent. of the increased value of said land in said district as assessed, the Board of Directors may, at their discretion, submit a proposition to the land owners of said district to assess a tax on said increased value of lands not to exceed 2 per cent. per annum for so many years as may be necessary to raise a fund equal to the estimated cost of said levee. The proposition above recited shall be submitted to the land owners of said district by the Board of Directors calling a meeting of said land owners in each county in said district, by giving ten days' notice by posting same in ten conspicuous places in each county, and if a majority of said land owners of said district shall attend the several meetings in said districts, and two-thirds of those attending vote for said taxation, the assessment shall be made by said board and the proceeds used for the construction of said levee."

"Section 6. That said Board of Levee Directors hereby created shall and are hereby declared to be the legal successors of the now existing Levee Board of St. Francis Levee District, and all books, papers and proceedings of the present board shall become a part of the books, papers and proceedings of the board hereby created, and shall be delivered to same as soon as organized. The said Levee Board hereby created shall organize by electing a President, a Secretary, a Treasurer and a Chief Engineer, and prescribe the duties and fix the salaries of said officers; provided, that any officer of the board who is not a member shall have no vote in said board. Said officers shall be elected for two years after the first annual meeting of said board, and biennially thereafter at regular meetings of said board."

"Section 7. It shall be the duty of said Board of Directors to elect one assessor, a land owner in said district, from each county in said district, who shall compose a Board of Assessors for said Levee District, and shall, each for the county he represents, make an assessment of all the lands in the district, in books to be provided by the Levee Board for that purpose. The said lands shall be entered upon said books in convenient subdivisions, as surveyed by the United States government, with appropriate columns showing the names and residences of owners of said lands, and mortgages of record, if any, known to the assessors; also a description of said land, the number of acres cleared, as nearly as said Assessor can ascertain without measurement; the value thereof as assessed without levee protection, and the value threof as estimated, increased by levee protection; provided, that railroad rights of way, including roadbed in said Levee District, shall be assessed according to the betterment and increase in value as real estate, herein referred to, and may be assessed per mile instead of per acre; provided further, that no error in the description of said lands shall invalidate said assessment, if sufficient description is given to ascertain where the land is situated."

"Section 8. That said Assessors shall make their assessments beginning the first Monday in April and completing the same by the first Tuesday in May, and shall so report to the Secretary of the Levee Board on or before the second Tuesday in May. They shall hold a meeting at the office or place of business of said Levee Board on the second Tuesday of May next after completing said assessment. They shall elect a Chairman and Secretary and keep a record of their proceedings; they shall compare and equalize their assessments and correct their books to conform to said equalization, and their assessments as equalized shall be the assessment of said Levee District for that year and until the next assessment. Said Assessors shall hold office for two years, and until their successors are elected and qualified, and shall receive for their work such compensation as county assessors receive for similar work. In all meetings of said Board of Assessors, a majority thereof shall be sufficient as a quorum for the transaction of all business."

"Section 9. That said Board of Levee Directors shall hold a regular or annual meeting on the second Tuesday in May of each year at such place as they may select as the domicile of the board, and such other meetings as their by-laws may provide for, and seven members present shall constitute a quorum for the transaction of such business as may properly come before said board. At each regular meeting the President shall lay before the board the annual report of the Chief Engineer, with the maps, papers and estimates accompanying same. Also the last assessment, showing the aggregate sum upon which a tax for levee purposes may be levied, and a report of the Treasurer of said board, showing the financial condition of said Levee District. After an examination of said reports, the said Levee Board shall decide what work they will undertake to do during that official year, and the rate per cent. on the aggregate increased value of lands in said Levee District that will be necessary to raise a sum sufficient to pay for said work, as provided in

Section five (5) of this act, provided the said tax shall not exceed five per cent., as provided."

"Section 10. That said assessment shall be a lien on said lands in the nature of a mortgage, and shall bear interest at the rate of six (6) per cent. per annum from thirty days after the first Monday in October."

Section 11 is replaced by the Act of 1895, which is copied as the substitute for it.

"Section 12. All persons having an interest in said lands, or recorded liens therein, shall be bound thereby and by the judgment and decree rendered therein, in the same manner as in other Chancery suits, saving to infants and insane persons having no guardian or curators the rights they now have by law to appear and except to said proceedings within twelve months after their disabilities are removed."

Section 13 is replaced by the Act of 1895, which is copied and is the substitute for it.

Section 14 is prescribed the bond of the Levee Tax Collector and provided for his settlements.

Section 15 provided for contracts for work to be done and regulated the letting of contracts for such work.

Section 16 regulated the execution of the work, the payments to be made, and the settlements for the work.

Section 17 prescribed the bond of the Treasurer of the Levee Board, and made the Treasurer the financial agent of the board, and authorized him to receive and receipt for all funds due the Levee District, and to pay out the same only upon the warrants of the Secretary, endorsed by the President.

Section 18 prescribed the compensations of the Board of Directors, and provided for salaries for the officers of the board.

Section 19 authorized the condemnation of the right of way for the levee where it could not be obtained by gratuitous relinquishment.

"Section 20. For the purpose of keeping the levee in said district in repair, after the levee contemplated by this Act shall have been completed, and to meet the incidental and contingent expenses of the district, there shall be levied and collected off the lands as reported benefited by said Assessors, an annual tax not to exceed five mills on the dollar of the value of such lands as assessed for State and county purposes, to be levied, extended and collected as State and county taxes are now collected, by the officer authorized to levy and collect the said tax, said taxes to be extended on the tax books of the county against the lands so taxable, as aforesaid, and to be paid over by the county collector to the treasurer of said Levee District, in coin or legal tender currency of the United States, to the credit of said Levee District. Provided, that the amount of said tax, not exceeding the rate per cent. aforesaid, shall be voted at a meeting of land owners in each county in said district called by notice, as required by Section five of this Act, at which there shall be present, at the several meetings herein provided for, within said district, either in person or by their agents or attorneys, authorized to act for them, a majority of the land owners of said district, and two-thirds of those present voting for said tax, and the same so certified to the County Courts of the several counties in the said district, by the Secretary of the said Levee Board, on or before the day fixed by law for fixing the county levy and making annual appropriations for the county. Provided, that the said Board of Directors herein named may at any time after organizing submit to the land owners in the several counties in said district, which failed to hold such meetings on October 1, 1892, by the methods herein provided, a proposition to levy a tax of one mill on the dollar to pay all expenses herein enumerated for the current year. The votes so taken shall be added to the votes of those coun-

ties taken October 1, 1892, by the President of said board, and if a majority of the land owners of said district are found to have voted, and two-thirds of those voting for tax, said tax shall at once be placed on the tax books of the several counties, and be collected and paid over to the Treasurer of said Levee Board, as herein provided."

Section 21 authorized the Board of Directors to consolidate with the Levee District in Missouri upon prescribed conditions.

Section 22 provided for the issuance of evidence of indebtedness by the Levee Board.

Section 23 repealed all laws in conflict with the Act.

Section 24 declared it took effect from and after its passage.

ACT LXXI.

Be it enacted by the General Assembly of the State of Arkansas:

Section 1. That Section 11 of the St. Francis Levee Act of the General Assembly of the State of Arkansas, of February 15, 1893, be amended so as to read as follows:

Said Board of Directors shall elect one collector for each county herein named, who shall be furnished by the Secretary of said board with a list of said assessments of the county for which he is collector, and he shall, on the first Monday in October of each year, proceed to collect said assessments, and if said assessments are not paid within thirty days, a penalty of 25 per cent. shall at once attach for such delinquency, and said Board of Directors shall enforce the collection of the whole by Chancery proceedings in a court of the county in which said lands are situated having chancery jurisdiction, and said court shall give judgment against the persons claiming to be the owners of such lands, if known to said board, for

the amount of such assessments, and said penalty of twenty-five per cent. and interest on said assessment from the end of said thirty days allowed for collection thereof, at the rate of six per cent. per annum, and all cost of the proceedings. If the ownership of any such delinquent lands be unknown to said board, such lands may be proceeded against as above set forth, for the collection of said assessments, penalty, interest and costs due thereon, as being owned by unknown owners. Said judgment shall provide for sale of said delinquent lands for cash, by a commissioner of the court, after advertisement as hereinafter set out. Said proceedings and judgment shall be in the nature of proceedings *in rem*, and it shall be immaterial that the ownership of said lands may be incorrectly alleged in said proceedings; and such judgment shall be enforced wholly against said land, and not against any other property or estate defendant. All or any part of said delinquent lands for each of said counties may be included in one suit for each county, instituted for the collection of said delinquent taxes, etc., as aforesaid, and all delinquent owners of said land, including those unknown, as aforesaid, may be included in said one suit as defendants; and notice of the pendency of such suit shall be given as against non-residents of the county and unknown owners, respectively, when such suits may be pending, by publication weekly, for four weeks prior to the day of the term of court on which final judgment may be entered for the sale of said land, in some newspaper published in the county where such suit may be pending, which public notice may be in the following form:

"*St. Francis Levee District*

vs. *NOTICE.*

"*Delinquent Lands.*

"The following named persons and corporations, and all others having or claiming an interest in any of the following described lands, are hereby notified that suit is

pending in the Circuit Court of ———— County, Arkansas, to enforce the collection of certain levee taxes on the subjoined list of lands, each supposed owner's lands being set opposite his or her or its name, respectively, together with the amounts severally due from each, to-wit."

Then shall follow a list of supposed owners, with a descriptive list of said delinquent lands and amounts due thereon, respectively, as aforesaid; and said published notice may conclude in the following form:

"Said persons and corporations, and all others interested in said lands, are hereby notified that they are required by law to appear and make defense to said suit, or the same will be taken for confessed, and judgment final will be entered directing the sale of said lands for the purpose of collecting said delinquent levee taxes, together with the payment of interest, penalty and costs allowed by law.

———————

"Clerk of Said Court."

And where the owners are unknown, that fact shall be so stated in said published notice. And as against any defendant who resides in the county where such suit may be brought, and who appears by the record of deeds in said county to be the owner of any of the said lands proceeded against, notice of the pending suit shall be given by the service of personal summons of the court, at least twenty days before the day on which said defendant is required to answer, as set out in said summons. And said suit shall stand for trial at the first term of the court after the complaint may be filed, if said four weeks in the case of a non-resident or unknown defendant, as aforesaid, or said twenty days in the case of resident defendants, as aforesaid, shall expire either before the first day of the term or during the term of court to which said suits are brought, respectively, unless a continuance is granted for good cause shown, within the discretion of the court; and such continuances, for good cause shown, may be

granted as to a part of said land or defendants, without affecting the duty of the court to dispose finally of the others, as to whom no such continuances may be granted; and in all cases where notice has been properly given as aforesaid, and where no answer has been filed, or, if filed and the cause decided for the plaintiff, the court, by its decree, shall grant the relief as prayed in the complaint, and shall direct said commissioner to sell the lands described in the decree at the courthouse door of the county wherein the decree is entered, at public outcry, to the highest bidder, for cash in hand, after having first advertised such sale (such advertisement may include all the lands described in the decree) weekly for two weeks consecutively, in some newspaper published in the county, if there be one, and if no such newspaper, then that such advertisement be published in some newspaper of an adjoining county; and if all of the lands be not sold on the day as advertised, such sale shall continue from day to day until completed, and said commissioner shall, by proper deeds, convey to the purchasers the lands so sold, and the titles to said lands shall thereupon become vested in such purchaser as against all others whomsoever, saving to infants and insane persons the rights given them by Section 12 of said Act of February 15, 1893.

Provided, that in any case where lands are offered for sale by said Commissioner, as provided by the (this) Act, and the sum of the tax due, together with the interest, costs and penalty, is not bid for the same, the said commissioner shall bid the same off in the name of the said Board of Directors of the St. Francis Levee District, bidding therefor the whole amount due as aforesaid, and shall execute his deed therefor, as in other cases under this Act, conveying such lands to said Levee Board, and such deeds, when duly executed in conformity to the provisions of this Act, and recorded, shall be received as evidence in all cases, showing an indefeasible title to such purchasers, unassailable in either law or equity.

Provided, that at any time within three years after the rendition of the final decree of the Chancery Court herein provided for, the owner of the lands may file his petition in the court rendering the decree, alleging the payment of the taxes on said lands for the year for which they were sold, and upon the establishment of that fact the court shall vacate and shall set aside said decree.

And provided further, actual service of summons shall be had where the defendant is in the county or where there is an occupant upon the land.

Section 2. That Section 13 of said Act be amended so as to read as follows: Said suit shall be conducted in accordance with the practice and proceedings of Chancery Courts in this State, except as herein otherwise provided, and except that neither attorneys nor guardians *ad litem*, nor any provision of Section 5877 of Sandels & Hill's Digest of the Statutes of Arkansas, shall be required, and except that said suits may be disposed of on oral testimony, as in ordinary suits at law; and this law shall be liberally construed to give said assessment lists the effect of *bona fide* mortgages, for a valuable consideration, and a first lien upon said land as against all persons having an interest therein. Provided, that no informality or irregularity in holding the meetings or in the description of valuation of the lands, or in the names of the owners or the number of acres therein, shall be a valid defense to such action. Provided, that in cases where the decrees may have already been rendered by the courts for the collection of delinquent taxes under the Act of which this Act is amendatory, and where no bond has been executed by the plaintiff in favor of the defendant, as required by the second subdivision of said Section 5877 of Sandels & Hill's Digest, such decrees shall be as valid and binding as if said bond had been (duly) executed and filed; and provided further, that as regards all suits for the collection of said levee taxes that may be pending at the date of the passage of this Act, said Section 5877 of said Digest

shall not apply, and this Act shall otherwise apply to all such suits as may be brought or pending at the date of the passage of this Act.

Section 3 amends Section 15 of the original Act, having reference to the bonds to be executed by contractors doing levee work.

Section 4 exempts lands in the Levee District lying between the levee and the Mississippi River from taxation for levee purposes.

Section 5 authorizes the St. Francis Levee Board to employ an attorney at a salary and traveling expenses.

Section 6 prohibits the increase of the rate of taxation for levee purposes, and provides that no assessments or collections under the Act shall be made or enforced after January 1, 1906, excepting assessments made before that date.

Section 7. That all laws of this State in conflict with this Act be, and the same are hereby, repealed, and that this Act take effect and be in force from and after its passage.

Approved April 2, 1895.

FILE COPY.

Office Supreme Court, U.S.
FILED.
NOV 6 1906
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 123.

A. B. BALLARD ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES W. HUNTER ET AL.

ANSWER OF PLAINTIFFS IN ERROR TO APPLICATION OF CHARLES W. HUNTER FOR WRIT OF CERTIORARI.

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,
Counsel for Plaintiffs in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23768

(19,917.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 123.

A. B. BALLARD AND JOSEPHINE W. BALLARD,
PLAINTIFFS IN ERROR,

vs.

CHARLES W. HUNTER, A. HACKLER, AND THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT, DEFENDANTS IN ERROR.

In response to the petition of Charles W. Hunter, one of the defendants in error, praying for a writ of certiorari, based on the suggestion of a diminution of the record herein filed, the plaintiffs in error, A. B. Ballard and Josephine W. Ballard, say:

(1.)

That the record of the suit was filed in this court on October 3, 1905, and the application for the writ of certiorari was not made until the present term, and no special cause for the delay, as required by rule No. 14 of the court, is stated in the petition.

(2.)

The record is properly certified by the clerk of the Supreme Court of Arkansas, and the case was considered and

decided in that court without reference to the writ of certiorari, which was ordered to issue to correct the record or the return made to such writ, if any was made. The record shows (pages 79-80) that the cause was called on May 2, 1904, and passed, and at a subsequent term, on the 9th day of January, 1905, was again called and passed to the 23d day of January, 1905, and on that day was heard and orally argued by the counsel and submitted and by the court taken under advisement, and that on the 11th day of February, 1905, without reference to the writ of certiorari, which was ordered to issue on January 28, 1905, or the return thereon, was heard on the transcript of the record of the chancery court of Crittenden county, and upon that transcript was finally decided and determined.

(3.)

Under the rule of the Supreme Court of Arkansas, as established by its decisions (Board of Directors of the St. Francis Levee Dist. *vs.* The Memphis Land and Timber Co. & Others, 70 Arks., 410), the transcript of the record sent from the Crittenden chancery court was the record of the suit for the purposes of that court, and that record could be corrected, if incorrect, only by sending up a correct transcript of the true record, and could not be corrected by any affidavit or certificate of the clerk of the chancery court of Crittenden county; and the Supreme Court of Arkansas made no order accepting the certificate of the clerk of the chancery court of Crittenden county as a part of the record of the suit, or as a substantial or sufficient return to any writ of certiorari, or treating it or making it any part of the record of the suit.

(4.)

Treating the certificate of the clerk of the chancery court of Crittenden county as a return to the writ of cer-

tiorari, awarded, it was not a sufficient correction of any error in the transcript of the record sent up to the Supreme Court of Arkansas from the chancery court of Crittenden county, because the statement in the certificate was merely that "the lands in the original record, a transcript of which has been filed in this cause, are correctly described in said transcript, except that the said transcript should show," &c.

The description of the lands should have appeared (1) in the complaint or the list of the lands attached to the complaint; (2) in the notice given under act No. 71 of the acts of Arkansas of 1895, under which the suit was begun and prosecuted; (3) in the decree of sale; (4) in the report of sale; and (5) in the decree confirming the report of sale or the deed made by the commissioner conveying the lands to Hunter under his purchase.

None of these records could be corrected by the certificate of the clerk, and if either one of them was incorrectly copied in the transcript of the record, the only remedy outside the agreement, authorized by rule 25 of the Supreme Court of Arkansas, was a writ of certiorari requiring the sending up of a correct copy in place of the incorrect copy of such record and the return of the clerk to such writ, with such correct copy appended as a part of his return.

The plaintiffs in error, for the reasons stated, object to the issuance of the writ of certiorari at this stage of the cause and because it could not legitimately result in any amendment of the record.

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,
Of Counsel for Plaintiffs in Error.

STATE OF TENNESSEE, *County of Shelby:*

I, Wm. M. Randolph, one of the counsel of the plaintiffs in error, do state on oath that the matters of fact set forth above in the answer to the petition for the writ of certiorari, are true to the best of my knowledge, information, and belief.

WM. M. RANDOLPH.

Subscribed and sworn to before me, Jos. M. Connable, a notary public in and for the said county, this the 3d day of November, 1906.

Witness my hand and seal of office as such notary public, at Memphis, Tenn., this November 3, 1906.

JOS. M. CONNABLE,
[SEAL.] *Notary Public.*

My commission expires October 13, 1909.

[Endorsed:] No. 123. A. B. Ballard *et als.*, pl't'fs in error, *vs.* Chas. W. Hunter *et als.*, def'ts in error. Error to the Supreme Court of Arkansas. Answer of A. B. Ballard and others to the application of Chas. W. Hunter for a writ of certiorari. Randolph & Randolph, att'ys. Notary fees, 25¢, paid by Randolph and Randolph.

FILE COPY.

Office Supreme Court
FILED
DEC 5 190
JAMES H. McKEN

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 123.

A. B. BALLARD ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES W. HUNTER ET AL.

APPENDIX TO BRIEF FOR PLAINTIFFS IN ERROR.

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,
Counsel for Plaintiffs in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24142

(19,917.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 123.

A. B. BALLARD ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES W. HUNTER ET AL.

APPENDIX TO BRIEF FOR PLAINTIFFS IN ERROR.

The sale involved in this case was made under one of the decrees under which the sale in *Johnson v. Hunter* was made. The Circuit Court of Appeals for the Eighth Circuit decided *Johnson v. Hunter* in August last, and in November overruled a petition for rehearing. The opinion has not yet been published in the reports, and for that reason we print it as an appendix to our brief, and ask that it be considered as a part of our argument.

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,
Of Counsel for Plaintiffs in Error.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

No. 2073, MAY TERM, A. D. 1906.

REBECCA A. JOHNSON ET AL., *Appellants,*
vs.
CHARLES W. HUNTER ET AL., *Appellees.*

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. William M. Randolph (Mr. George Randolph and Mr. Wassell Randolph were with him on the brief) for appellants.

Mr. A. B. Shafer (Mr. L. P. Berry was with him on the brief) for appellees.

Before Sanborn and Van Devanter, Circuit Judges, and Philips, District Judge.

SYLLABUS.

1. PROCESS—CONSTRUCTIVE SERVICE—AFFIDAVIT FOR—ARKANSAS SPECIAL STATUTE.—Under the Arkansas special statute (Laws 1893, pp. 24, 119; Laws 1895, p. 88) for enforcing the payment of levee taxes upon lands in the St. Francis Levee District by suits in the chancery courts, which provides that "notice of the pendency of such suit shall be given as against non-residents of the county * * * by publication," but "actual service of summons shall be had where the defendant is in the county or where there is an occupant upon the land," and under sec. 5679 Sandels & Hill's Digest, which the act makes applicable to such suits, an affidavit filed in the suit and alleging

that a defendant, proceeded against as a known owner, is a non-resident of the county and is absent therefrom, and that there is not an occupant upon his land, is a pre-requisite to service by publication against him, and is strictly jurisdictional in character.

2. SAME—AFFIDAVIT MUST STATE ESSENTIAL FACTS, OR PUBLICATION WILL BE WITHOUT AUTHORITY.—An affidavit for publication which is not merely informal, but entirely fails to state some of the facts made essential by statute, will not authorize service by publication.

3. JUDGMENT — JURISDICTION — PRESUMPTIONS — COLLATERAL ATTACK.—The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts, concerning which the record is silent, and when it discloses the evidence upon which service by publication was had, and this was ineffectual for the purpose, it will not be presumed that other or different evidence was presented, but the judgment will be void and open to collateral attack.

VAN DEVANTER, Circuit Judge, delivered the opinion of the court:

This is a controversy over the title to certain lands in Crittenden County, Arkansas, which were sold under decrees rendered in 1898 and 1899 by the chancery court of that county in suits prosecuted by the St. Francis Levee District to enforce the payment of levee taxes. There were two such suits, one embracing part of the lands and the other the remainder, the proceedings in which were the same so far as they are material to the present decision. The appellants are the heirs at law of A. H. Johnson, the owner of the lands prior to and at the time of the suits, and the appellees are the holders of the title conveyed by the sales made under the decrees.

The appellants, by a bill to quiet title, collaterally assailed the decrees upon the ground, among others, that, in so far as they affect the lands now in controversy, they rest entirely upon service of notice by publication, which was unauthorized and void, because no affidavit was made or filed showing or stating the existence of conditions rendering that mode of service permissible. The appellees, by a cross bill, affirmed the validity of the decrees, as also of the sales thereunder, and prayed that their title be quited. The suit was commenced in the chancery court of Crittenden County and was then removed to the circuit court, which, upon final hearing, rendered a decree dismissing the bill and granting the relief prayed in the cross bill. 127 Fed. 219.

The other facts material to the present decision are as follows: Johnson was a resident of the state of Ohio. He did not appear in either of the suits of the levee district and knew nothing of them. No attempt was made to bring him into court by actual service of a summons. The complaints described him as the known owner of the lands now in controversy, alleged that he was a non-resident of Crittenden County, and prayed that a warning order be issued against him and such other defendants as were alleged to be non-residents and that summons be issued for the resident defendants, but there was no allegation that Johnson was not then in the county or that there was then no occupant upon his lands. The complaints were verified. Upon the filing of them, and without the making or filing of any affidavit, other than the verified complaints, the clerk, conforming to the prayer of each complaint, made and caused to be published warning orders against Johnson and such other defendants as were alleged to be non-residents. Each decree recites that certain of the defendants, not including Johnson, were served with summons by the sheriff and that certain other defendants, including Johnson, were constructively summoned or warned by publication. Neither decree purports to find that Johnson was not in the county when the

suit was commenced, or that there was then no occupant upon his lands, or that notice to him by publication was authorized.

The suits were instituted under the Arkansas act of February 15, 1893, as amended March 21, 1893, and April 2, 1895, (Laws 1893, pp. 24, 119; Laws 1895, p. 88) which contains these provisions:

"And notice of the pendency of such suit shall be given as against non-residents of the county, and unknown owners, respectively, when such suits may be pending, by publication * * * . And as against any defendant who resides in the county where such suit may be brought, and who appears by the record of deeds in said county to be the owner of any of the lands proceeded against, notice of the pending suit shall be given by the service of personal summons of the court, * * * . And provided further, actual service of summons shall be had where the defendant is in the county or where there is an occupant upon the land * * * . Said suit shall be conducted in accordance with the practice and proceedings of chancery courts in this state, except as herein otherwise provided, * * * ." Laws 1895, pp. 89-92.

The act also contains a form of notice, to be used when service by publication is had, which is in the nature of an extended warning order, to be made or issued by the clerk, and is required to set forth the names of the known owners who are to be thereby notified, together with a description of their lands. How the clerk is to be advised when the conditions exist, in respect of any defendant, which render service by publication permissible is not directly stated, but the provision that suits to enforce the payment of taxes shall be conducted according to the practice and proceedings of chancery courts, except as it is otherwise provided in the act, makes applicable to such suits section 5679 of Sandels & Hill's Digest, which, in respect of proceedings in the chancery and other courts of the state, authorizes the clerk to

make a warning order and to cause it to be published only when it appears by affidavit filed in his office that the conditions exist which render that mode of service permissible. Such an affidavit, adapted to the terms of the levee act, and placed of record in the suit, is therefore a prerequisite to the issuance and publication of the prescribed warning order, and is strictly jurisdictional in character. *Memphis Land & Timber Co. v. St. Francis Levee District,* 70 Ark. 409; *McMahan v. Smith,* 69 Ark. 591; *Howard v. De Cordova,* 177 U. S. 609, 614; *Noble v. Union River Logging R. R. Co.,* 147 U. S. 165, 173; *Earle v. McVeigh,* 91 U. S. 503, 508; *Barber v. Morris,* 37 Minn. 194; *Brown v. St. Paul, etc., Co.* 38 Minn. 506; *Murphy v. Lyons,* 19 Neb. 689; *Anderson v. Coburn,* 27 Wis. 558; *Chase v. Kaynor,* 78 Iowa 449; *Adams v. Baldwin,* 49 Kan. 781. We say adapted to the terms of the levee act, because the particular conditions in which constructive service is permissible in other suits, as specified in section 5679, such as "that the defendant is a non-resident of this State, or has departed from this State with intent to delay or defraud his creditors" are essentially different from those specified in the levee act and are inapplicable to suits under it. Now what are the conditions in which service by publication against a defendant, as a known owner, is permissible in suits under that act? The answer is not doubtful, when the provisions of the act before quoted are read together in the light of recognized rules of interpretation. The conditions are, that the defendant must be a non-resident of the county and must be absent therefrom and that there must not be an occupant upon the land. If the defendant be a resident of the county, or be present therein, or if there be an occupant upon the land, actual service of a summons is required. A defendant may be a non-resident of the county and yet be present therein so that actual service upon him can be had. If he is so present, the act plainly calls for such service. And a defendant may be a non-resident of the county and absent therefrom and yet the

land be occupied by a tenant or other representative upon whom a summons can be served. If the land is so occupied, the act plainly calls for such service. *Banks v. St. Francis Levee District*, 66 Ark. 490, 494.

The circuit court, while seemingly conceding that service by publication in the absence of the requisite affidavit would be void, held that a verified complaint alleging the existence of conditions rendering such service permissible, may be treated as both a complaint and an affidavit, and further held that the complaints of the levee district were sufficient to sustain the service by publication because they alleged that Johnson was a non-resident of the county. We concur in the view that a complaint, if properly verified and containing what is required to be set forth in an affidavit for publication, may perform the office of such an affidavit, but we cannot assent to the view that these complaints were sufficient to sustain the service by publication. They did not contain what was required to be set forth in an affidavit. Of the three concurring conditions, without the existence of which that mode of service was not permissible, the complaints alleged the existence of one and were altogether silent in respect of the other two, that is, they stated that Johnson was a non-resident of the county but did not state that he was not present therein or that there was not an occupant upon the lands. An affidavit which is not merely informal, but entirely wanting in some of the essentials prescribed by statute, will not authorize constructive service. *McMahan v. Smith*, 69 Ark. 591; *Shields v. Miller*, 9 Kan. 390; *Endel v. Leibrock*, 33 Ohio St. 254; *McGavock v. Pollack*, 13 Neb. 535; *Carnes v. Mitchell*, 82 Iowa 601; *McCracken v. Flanagan*, 127 N. Y. 493; *Palmer v. McMaster* (Mont.) 33 Pac. 132.

We have not failed to observe that in *Memphis Land & Timber Co. v. St. Francis Levee District*, supra, and in the more recent case of *Ballard v. Hunter*, 85 S. W. 252, the Supreme Court of Arkansas seems to speak of non-residence

as if it were the only jurisdictional fact to be shown in the affidavit for publication, but we do not regard these decisions as intended to express the deliberate judgment of the court upon this subject. In one the question actually considered was whether or not any affidavit for publication was necessary, rather than what it should contain, and in the other it was whether or not a verified complaint could perform the office of such an affidavit; but in neither does the court's attention appear to have been directed to the provision, "and provided further, actual service of summons shall be had where the defendant is in the county or where there is an occupant upon the land." In the arrangement of the act this provision is somewhat separated from the others which it is obviously designed to modify and restrain, and, in the absence of any controversy respecting it, it may well be that it was not observed by the court. Moreover, it was treated in *Banks v. St. Francis Levee District, supra,* as imposing restrictions upon service by publication and rendering void a decree for the sale of lands whose non-resident owners were brought into court merely by publication when at the time the lands were occupied by agents and tenants upon whom actual service of summons could have been had. As the object of exacting an affidavit as a prerequisite to notice by publication is to insure actual service of a summons in all cases where that is necessary and to avoid the rendition of decrees and the creation of titles which are void, we think it is plain the statute contemplates that the affidavit shall set forth, all and not part, of what is essential to a lawful service by publication.

Did the absence of the requisite affidavit render the service by publication void and subject the decrees to collateral attack, or are they protected by a presumption that a sufficient affidavit was made and filed, notwithstanding what has been shown in that regard? The appellees strongly insist that as the chancery court of Crittenden County was a superior court of general jurisdiction and was specially clothed

with authority to entertain suits to enforce the payment of levee taxes, the decrees are protected against collateral attack by a presumption that the warning order was made and published only after a sufficient affidavit had been made and filed. We assent to the premises, but not to the conclusion. The record in each suit fairly discloses that service by publication was had upon the mere allegation of non-residence in the complaint, and, as this did not warrant that mode of service, the invalidity of the decree is shown upon the face of the record. There is therefore no room for presumptions, because they are indulged in respect of jurisdictional facts only when the record is silent; not when it discloses what was done and shown. 1 Black on Judgments, Sec. 278. As was said in *Galpin v. Page*, 18 Wall., 350, 366:

"But the presumptions, which the law implies in support of the judgments of superior courts of general jurisdiction, only arise with respect to jurisdictional facts concerning which the record is silent. Presumptions are only indulged to supply the absence of evidence or averments respecting the facts presumed. They have no place for consideration when the evidence is disclosed or the averment is made. When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, and it will not be presumed that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer or the proof of service contained in the record, that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appears in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so it would never be possible to attack collaterally the judgment of a superior court, although a

want of jurisdiction might be apparent upon its face; the answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed."

The rule so announced was re-affirmed and applied in *Settlemier v. Sullivan,* 97 U. S. 444, 448, where a judgment, although reciting that the defendant had been duly served with process, was held void upon collateral attack because of the insufficiency of the service disclosed by the record. The statute required the service to be made by delivering a copy of the process to the defendant personally, or, if he could not be found, to some member of his family at his usual place of abode, and the officer's return recited that he served the process by delivering a copy to the defendant's wife at his usual place of abode, but did not state that the defendant could not be found. The court, after observing that the inability of the officer to find the defendant was not a fact to be inferred, but a fact to be affirmatively stated in the return, said:

"Here it is contended that the recital in the entry of the default of the defendant in the case in the State Court, 'that although duly served with process, he did not come, but made default,' is evidence that due service on him was made, notwithstanding the return of the sheriff, and supplies its omission. But the answer is, that the recital must be read in connection with that part of the record which gives the official evidence prescribed by statute. This evidence must prevail over the recital, as the latter, in the absence of an averment to the contrary, the record being complete, can only be considered as referring to the former.

"We do not question the doctrine that a court of general jurisdiction acting within the scope of its authority—that is, within the boundaries which the law assigns to it with respect to sujbects and persons—is presumed to act rightly and to have jurisdiction to render the judgment it pronounces, until the contrary appears. But this presumption

can only arise with respect to jurisdictional facts, concerning which the record is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. If the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge. But if the record give the evidence or make an averment with respect to a jurisdictional fact, it will be taken to speak the truth, and the whole truth, in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred."

So in *Cheely v. Clayton*, 110 U. S. 701, 708, where the evidence upon which service by publication was had in a divorce proceeding was disclosed by the record and was insufficient, it was held, upon collateral attack, that this controlled a general recital in the decree that due service had been had, and the decree was declared void.

And such is the rule of decision in the Supreme Court of Arkansas. *Parr v. Matthews*, 50 Ark. 390, 393; *Cross v. Wilson*, 52 Ark. 312; *Martin v. M'Dairmid*, 55 Ark. 213, 216; *Gregory v. Bartlett*, Id., 30, 35. In the last case a collateral attack was made upon a decree of one of the chancery courts of the State resting upon notice by publication, which the record disclosed was had without prior compliance with one of the requirements of the statute, although it was stated otherwise in the decree. The court held the decree void, saying:

"The contention that the court has passed upon the sufficiency of the notice by the rendition of the decree, and that the mistake was an error in the exercise of jurisdiction, to be taken advantage of only in a direct proceeding, is untenable, because, until the foundation had been laid for the issue and execution of process, the jurisdiction of the court had not attached for any purpose. No process was ever issued in the cause in which the challenged decree was rendered; the court's determination of any question was therefore *coram*

non judice and binding upon no one. * * * The recital of the decree that there was proper notice to the parties in interest is not conclusive of that fact, but must be read in connection with that part of the record which gives, or is required to give, the official evidence of jurisdiction, as prescribed by statute. *Boyd v. Roane,* 49 Ark. 397; *Settlemier v. Sullivan,* 97 U. S., 444; *Galpin v. Page,* 18 Wall., *sup.* If such evidence is not required by the statute to be placed upon the record and the record recites, or is silent as to, the facts necessary to show jurisdiction, their existence will be presumed; but no presumptions are indulged when the evidence is stated upon the record (*Boyd v. Roane,* 49 Ark., *sup.*), or where the statute requires the jurisdictional facts to appear of record and they are not made so to appear. *Applegate v. Mining Co.,* 117 U. S., 255; *Galpin v. Page,* 18 Wall., *sup.*"

Other decisions to the same effect are *Dick v. Foraker,* 155 U. S. 404; *Barber v. Morris,* 37 Minn. 194; *Murphy v. Lyons,* 19 Neb. 689; *Ely v. Tallman,* 14 Wis. 28; *Clark v. Thompson,* 47 Ill. 25.

Our conclusion is, that the service by publication was void because had without the prerequisite affidavit, as is disclosed by the record in each suit, and that the decrees were therefore subject to collateral attack.

The decree of the Circuit Court is accordingly reversed, with directions to dismiss the cross-bill of the appellees and to enter a decree according to the prayer of the appellants' bill, but omitting therefrom the tract which it is conceded was included in the bill by mistake.

Filed August 20, 1906.
A true copy.
Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

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CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 123.

A. B. BALLARD ET AL., PLAINTIFFS IN ERROR,

vs.

CHARLES W. HUNTER ET AL.

SUGGESTION OF DIMINUTION OF THE RECORD AND MOTION FOR A WRIT OF CERTIORARI.

L. P. BERRY,
Counsel for Defendant in Error, Charles W. Hunter.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23769

(19,917.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 123.

A. B. BALLARD AND JOSEPHINE W. BALLARD,
PLAINTIFFS IN ERROR,

vs.

CHARLES W. HUNTER, A. HACKLER, AND BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT, RESPONDENTS IN ERROR.

Petition and Exhibit In Re Certiorari for Diminution of Record.

To the Honorable Justices of the Supreme Court of the United States:

Charles W. Hunter, one of the respondents in error above named, respectfully shows to the court that the record in this cause certified up by the clerk of the Supreme Court of the State of Arkansas is incomplete in this, to wit: That there is omitted from said transcript a certain writ of certiorari for diminution of the record and the return thereto made by the clerk of the chancery court of Crittenden county, Arkansas; which said writ of certiorari and return thereto annexed, so made as above, is of record in said Supreme Court of the State of Arkansas. A certified copy of the said writ of

certiorari for diminution of the record and the return thereto annexed is made a part of this petition and hereto attached and marked Exhibit "A."

Wherefore the respondent in error prays that a writ of certiorari for diminution of the record be issued and directed to the judges of the said Supreme Court of the State of Arkansas, commanding them that, searching the records and proceedings in said cause, they forthwith certify to this court the parts of said records so omitted as aforesaid.

CHARLES W. HUNTER, *Petitioner,*
By L. P. BERRY,
Counsel for Petitioner.

STATE OF ARKANSAS, *County of Crittenden, ss:*

L. P. Berry says that he is one of the counsel for the above-named petitioner; that he has read the foregoing petition and knows that the facts therein stated are true.

L. P. BERRY,
Counsel for Petitioner.

Subscribed and sworn to before me this October 18, 1906.
[SEAL.] R. J. SOUTHALL,
Notary Public.

My commission expires November 28, 1907.

Exhibit "A" to Petition.

Certiorari and Return.

No. 5062.

STATE OF ARKANSAS, *In the Supreme Court, ss:*

The State of Arkansas to the clerk of the Chancery Court of Crittenden county, Greeting:

Whereas, in a case pending in the Supreme Court of the State of Arkansas, wherein A. B. Ballard *et al.* are appellants and Chas. W. Hunter *et al.* are appellees, it has been suggested by said appellees that there is a diminution of the record filed in this case, in this: the lands in the record of said cause are not properly described in the copy of the complaint and decree rendered in said cause, with a prayer that the record be amended; you are therefore hereby commanded that you certify to our Supreme Court, without delay, a full, true and complete transcript of the record of said circuit court, so as above suggested to be diminished; that our Supreme Court, upon consideration of a complete record, may cause to be done therein what should be done. Hereof fail not and make due return of this writ under your official seal.

In testimony whereof, I, P. D. English, clerk of said Supreme Court, hereto set my hand, at the city of Little Rock, and affix the seal of said court this 28th day of January, 1905.

[L. S.] P. D. ENGLISH, *Clerk.*

Return.

The lands in the original record, a transcript of which has been filed in this cause, are correctly described in said transcript, except that the said transcript should show that the W. ½ and S. E. ¼ of Sec. 32, T. 4 N., R. 7 E., was described

and proceeded against both in the complaint and decree under the description W. ½ and S. E. ¼, Sec. 32, T. 4 N., R. 7 E., and not, as erroneously described in said transcript, as W. ½ S. E. ¼, Sec. 32, T. 4 N., R. 7 E., 480 acres.

Attest with seal this 2d Feb'y, 1905.

[L. S.] LOUIS BARTON, *Clerk.*

STATE OF ARKANSAS, *County of Crittenden, ss:*

I, Lewis Barton, clerk of the circuit court of said county, hereby certify that I have made out and certified a full, true and complete transcript of the diminution suggested, which is hereto endorsed.

In testimony whereof, I hereto set my hand as clerk and affix the seal of said circuit court this 2d day of February, A. D. 1905.

[L. S.] LOUIS BARTON, *Clerk.*

Endorsed: Filed February 4, 1905. P. D. English, clerk.

In testimony that the above is a true copy of the certiorari and return thereto in the case therein stated, said certiorari and return having been lost when the original transcript of the record in said cause was prepared and sent to the Supreme Court of the United States on writ of error and since found,

I, Peyton D. English, clerk of said Supreme Court, hereby set my hand and affix the seal of said court at the city of Little Rock, the capital of said State, this the 16th day of October, A. D. 1906.

[SEAL.] PEYTON D. ENGLISH, *Clerk.*

Clerk's fee, $2.00, paid by Berry & Schafer, attorneys.
P. D. ENGLISH, *Clerk.*

Endorsed: No. 5062. Ballard *et al. vs.* Hunter *et al.* Certiorari and return. Filed February 4th, 1906. P. D. English, clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 123.

A. B. BALLARD and JOSEPHINE W. BALLARD, *Plaintiffs in Error,*

vs.

CHARLES W. HUNTER, A. HACKLER, and BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT, *Respondents in Error.*

Motion for Certiorari.

Comes now Charles W. Hunter, one of the respondents in error in the above-entitled cause, by his counsel, L. P. Berry, Esq., and suggests diminution of the record in this cause in this, to wit:

That a certain writ of certiorari for diminution of the record and the return thereto made by the clerk of the chancery court of Crittenden county, Arkansas, of record in the said Supreme Court of the State of Arkansas, is omitted from the transcript of the record filed in this cause in this court.

Wherefore the said defendant in error moves the court, under rule 14 of the rules of this court, to award a writ of certiorari, to be issued and directed to the judges of the said Supreme Court of the State of Arkansas, commanding them that, searching the records and proceedings in said cause, they forthwith certify to this court those parts of the said records so omitted as aforesaid.

L. P. BERRY,
Counsel for Defendant in Error.

Dated October 31, 1906.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 123.

A. B. BALLARD and JOSEPHINE W. BALLARD, *Plaintiffs in Error,*

vs.

CHARLES W. HUNTER, A. HACKLER, and BOARD OF DIRECTORS ST. FRANCIS LEVEE DISTRICT, *Respondents in Error.*

Notice of Motion.

To WM. M. RANDOLPH, GEO. RANDOLPH, and WASSELL RANDOLPH, *Counsel for Plaintiffs in Error:*

Please take notice that on the 12th day of November, 1906, at the opening of court on that day, or as soon thereafter as counsel can be heard, the motion of Charles W. Hunter, one of the defendants in error in the above-entitled cause, for a writ of certiorari for diminution of the record, a copy of which said motion is hereto attached, will be submitted to the Supreme Court of the United States for the decision of the court thereon.

L. P. BERRY,
Counsel for Defendant in Error.

Dated October 31, 1906.

Due service of the attached petition, affidavit, motion and notice is hereby admitted this 2d day of November, 1906.

RANDOLPH & RANDOLPH,
Counsel for Plaintiffs in Error.

[Endorsed:] No. 123. A. B. Ballard *et al.*, pl't'fs in error, *vs.* Chas. W. Hunter *et al.*, def's in error. In error to the Supreme Court of Arkansas. Petition, affidavit, motion, and notice of application for certiorari for diminution of the record.

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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1906.

No. 123

A. B. BALLARD and JOSEPHINE W. BALLARD,
vs. Plaintiffs in Error,
CHARLES W. HUNTER, A. HACKLER and the BOARD OF DIRECTORS, ST. FRANCIS LEVEE DISTRICT,
Defendants in Error.

In Error to the Supreme Court of Arkansas.

Abstract, Brief and Argument

For the Defendant in Error, Charles W. Hunter.

L. P. BERRY,
Counsel for Defendant in Error.

E. C. TOOF & CO., PRS. & LITHS. MEMPHIS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 123

A. B. BALLARD AND JOSEPHINE W. BALLARD,
vs. Plaintiffs in Error,
CHARLES W. HUNTER, A. HACKLER AND THE BOARD OF DIRECTORS, ST. FRANCIS LEVEE DISTRICT,
Defendants in Error.

In Error to the Supreme Court of Arkansas.

Statement of Case for Defendant in Error, Charles W. Hunter.

Act XIX. of Acts 1893, page . s amended by Act LXXV., of Acts 1893, page 119, as ther amended by Act LXXI., of Acts 1895, page 88, organized parts of seven counties lying in the Mississippi river and St. Francis river basins into a levee district, and provided for the building of a levee along the Mississippi river front and the digging of canals to drain the swamp and overflowed lands of said basin. These acts, after providing for the creation of the St. Francis Levee District, provide for the creation of a board of directors, who shall be a body politic and corporate, with power to sue and be sued; for a listing of the lands in said district in the names of the owners and mortgagees of record; for an ascertainment of the betterment arising to the lands within the district by

reason of the construction of a levee; for the assessment of the cost of building said levee upon the said betterment; for the collection of said assessment by a collector; for the return of lands as delinquent where the assessment is not paid with a penalty of 25 per cent. and interest; that the assessment shall be a first lien upon said lands in the nature of a mortgage; that no error in the description of the lands shall invalidate the assessment if a sufficient description is given to ascertain where the land is situated; for the collection of delinquent assessments, penalties and costs by chancery proceedings had in the counties where the lands are situated; that all or any part of the delinquent lands in each county may be included in one suit; that it shall be immaterial that the ownership of said lands may be incorrectly alleged in said proceedings; that no informality or irregularity in holding the meetings or in the description or valuation of the lands or in the names of the owners, or the number of acres therein, shall be a valid defense to such action; that where a defendant resides in the county in which the suit is brought and appears by the record of deeds in said county to be the owner of any of the lands proceeded against, personal service of summons shall be had at least twenty days before he is required to answer; that where the ownership of lands is unknown to the Board of Directors they shall be proceeded against as owned by unknown owners; that where a defendant is a non-resident of the county in which suit is brought or the land is owned by an unknown owner, public notice of the pendency of such suit shall be given by publication in some newspaper published in the county for four weeks prior to the day such defendants are required to answer; the

act prescribes the form of notice, which gives the purpose of the suit, describes the lands proceeded against, each supposed owner's name being set opposite his, her or its name, respectively, together with the amounts severally due from each, and is directed not only to the alleged owner, but to all others interested in said lands, and warning them to appear and make defense to said suit. In addition to the notice by publication as against non-residents of the county and unknown owners, the act provides for personal service of summons upon the alleged owner where he is found within the county, and for personal service of summons upon any occupant that may be found upon any of the lands proceeded against regardless of whether he is named as a party defendant to the suit or not; prescribes that the cause shall stand for trial at the first term of the court after the complaint is filed, if the time required for the publication of the notice and service of summons shall expire either before the first day of the term or during the term to which the suit is brought; that the suits may be disposed of on oral testimony as in ordinary suits at law; for the granting of continuances as to a part of the lands without affecting the duty of the court to dispose finally as to other lands; that where no answer is filed, or if filed and the cause decided for the plaintiff, the court, by its decree, shall grant the relief as prayed in the complaint; that the court shall render judgment against the persons claiming to be the owners of the lands for the delinquent assessments, penalty, interest and costs of suit, and that such judgments shall be enforced wholly against the lands and not against any other property or estate of defendants; that the proceedings and judgment shall be in the nature of proceedings in

rem; that this act shall be liberally construed so as to give said assessment lists the effect of bona fide mortgages for a valuable consideration and a first lien upon said lands as against all persons having an interest therein; provides for a sale by a commissioner, for cash, after having first given two weeks' notice of such sale by publication in a newspaper; that the commissioner shall execute deeds to the several purchasers; that where no person shall bid the amount due for assessment, penalty, interest and costs of suit on any tract, the commissioner shall bid the same in for the plaintiff and execute his deed therefor; that the titles to said lands shall become vested in such purchasers as against all others whomsoever, and that such deeds, when executed in conformity with this act and recorded, shall be received as evidence in all cases showing an indefeasible title in such purchasers, unassailable in either law or equity; that all persons having an interest in said lands or recorded liens therein shall be bound thereby and by the judgment and decree rendered therein in the same manner as in other chancery suits, saving to infants and insane persons without guardian or curators, the right to appear and except to said proceedings within twelve months after the removal of their disabilities; that at any time within three years after the rendition of the final decree in said causes the owner of the lands may file his petition in the court rendering the decree alleging the payment of the taxes on the land for the year for which they were sold, and upon the establishment of that fact the court shall vacate and set aside the decree; provided, further, that said suits shall be conducted in accordance with the practice and proceedings of chancery courts in this State, except as herein otherwise provided,

and except that neither attorneys nor guardians ad litem, nor any provision of Section 5877 of Sandels & Hill's Digest of the statutes of Arkansas shall be required. (See Appendix to brief of Plaintiffs in Error.)

The foregoing is, in brief, the provisions of the special act under which the decree and sales were had that are attacked as being unconstitutional in the case at bar. Proceeding under the authority of this act the Board of Directors of the St. Francis Levee District, on December 21, 1897, filed a suit in the Crittenden Chancery Court, styled Board of Directors, St. Francis Levee District, Plaintiff, vs. Memphis Land and Timber Company, A. B. Ballard et al., Defendants. This complaint alleged the creation and organization of the St. Francis Levee District; the ascertainment of the benefit accruing to the lands in said district by reason of the construction of a levee; the vote and levying of an assessment upon said betterment; the return of the tracts sued upon as delinquent for the years therein mentioned; that A. B. Ballard was the owner of the west half and southeast quarter of section thirty-two, in township four north, and in range seven east, containing 480 acres; also of the west half of the northeast quarter of section thirty-two in township four north and in range seven east, containing eighty acres, and that the same were delinquent for levee taxes for the years 1895, 1896 and 1897, and setting forth the amount of taxes, penalty and interest due upon each tract; that A. B. Ballard (and others) were non-residents of the county of Crittenden and prayed the issuance of process to bring them before the court; that the taxes, etc., be declared a first lien and the lien foreclosed in default of payment, and the said several tracts sold in

default of payment thereof. The complaint was verified by an attorney for the plaintiff. Section 6121 of Kirby's Digest provides: "The verification of any pleading of a corporation may be by * * * its attorney in the action." (Tr. p. 9, et seq.) The decree in said cause was rendered on February 14, 1898, a day of the January (1898) term of the Crittenden Chancery Court, and was responsive to the complaint and within the issues raised. (Tr. p. 14, et seq.) The decree finds that the defendants * * * A. B. Ballard, * * * (and others), owners of lands who were unknown, were severally constructively summoned by publication in a newspaper published in Crittenden county, Arkansas, weekly for four weeks before this day, proof of which has been previously filed herein. (Tr. p. 16.) The decree awards taxes, penalty, interest and costs against the lands described in the complaint for the years therein alleged as delinquent, decrees sale in default of payment and appoints a commissioner to execute the decree. The decree is based upon the complaint, documentary evidence and oral evidence of witnesses named. (Tr. p. 16.) The sale under said decree was had by the commissioner on the 13th and 14th days of June, 1898, and was reported to and confirmed by the court at its July term, 1898. (Tr. p. 21.) The commissioner reported the sale of the lands in controversy to defendant in error, Charles W. Hunter, viz.: The west half and southeast quarter of section thirty-two, in township four north, and in range seven east, containing 480 acres, and the west half of the northeast quarter of section thirty-two, in township four north, and in range seven east, containing eighty acres, for the taxes, penalty, interest and costs due thereon, respectively. (Tr. p. 22.)

At the January term, 1899, the deed from the commissioner to Hunter was acknowledged in open court and approved. (Tr. p. 25, and Tr. p. 69.)

At the September term, 1899, on September 25, the plaintiffs in error filed their pleading in the Crittenden Chancery Court, and defendant in error, Charles W. Hunter, entered his appearance thereto. (Tr. p. 26, et seq.) Neither the defendant, A. Hackler, nor the defendant, Board of Directors, St. Francis Levee District, ever entered their appearance to said suit, nor were they ever made parties to said proceeding by service either personal or constructive. The case was tried upon an agreed statement of facts. (Tr. p. 38.) At the February term, 1902, the case was tried and the cause dismissed and an appeal taken to the Supreme Court. (Tr. p. 72.) The proceedings had in the Supreme Court resulting in the affirmance of the decree of the lower court are found on page 79 of transcript; the opinion rendered by the Supreme Court is found on page 81 of transcript. A large part of the transcript is taken up with the record of a suit that should not have been incorporated therein.

The case is now here on error, the assignments of error being set out in brief of plaintiffs in error, and also on pages 5-8 of transcript.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR, CHARLES W. HUNTER.

A judicial sale of lands for illegal taxes, penalty, interest and costs is not a taking of property without due process of law.

Assignments of Error I., II. and III. raise the question of the sale of the lands of plaintiffs in error for illegal taxes, penalty, interest and costs of suit. Plaintiffs in error claim to own only the south half of the northwest quarter and the southwest quarter of section thirty-two in township four north, and in range seven east, and allege that as these lands were sold as a part of and under the description of the west half and southeast quarter of section thirty-two, in township four north, and in range seven east, they were sold in part for taxes, penalty, interest and costs not legally chargeable thereon, and that thereby they were deprived of their property without due process of law.

Assignment of Error IV. raises the question of the sale of the lands of plaintiffs in error for costs not legally chargeable thereon, and that thereby they were deprived of their property without due process of law. It should be borne in mind that the sales under consideration are judicial sales and not ministerial sales. Also, that the proceeding adopted by plaintiffs in error is a collateral attack upon such sales. (Opinion, Tr. 83.) The great bulk of the cases cited by counsel for plaintiffs in error are cases relating to minis-

terial sales and not to judicial sales. The objections urged are matters of defense that should have been made upon the hearing of the cause. The decree was rendered and the sales made after notice to the alleged owner and all others interested to appear and make defense. These objections are answered by referring to the obvious fact that the term, "due process of law," refers to procedure, and that the provision that no person shall be deprived of his property without due process of law guarantees that every person shall hold his property inviolate until deprived thereof by a course of procedure which conforms to the characteristics of "due process of law." The phrase is not designed to protect against the cause of action, but only against the procedure by which the cause of action is enforced. It relates to procedural and not to substantive rights. Assuming, then, that the procedure was such as was authorized by the levee act, the mere fact that the lands of plaintiffs in error were sold in part for taxes, penalty, interest and costs not legally chargeable thereon, if in fact true, does not amount to a deprivation of property without due process of law.

Burcham v. Terry, 55 Ark. 398.

Doyle v. Martin, 55 Ark. 37.

Kelly v. Laconia Levee District, 74 Ark. 202; 85 S. W. 249.

Minneapolis, Etc., v. Debenture Co., 81 Minn. 66.

Due process of law does not require that the true owner of land be named in a judicial proceeding for the collection of delinquent taxes where the land is described in a public notice directed to an alleged owner and all others interested therein.

Assignment of Error V. raises the question of the failure to make Josephine W. Ballard a party to the levee proceedings by name, and contends that because she was not made a party by name she has been deprived of her property without due process of law. This objection is answered in the opinion of the court below. (Tr. p. 83.) Judge Cooley, in his work on Taxation, third edition, page 884, says: "Proceedings of this nature are not usually proceedings against parties, nor, in the case of lands or interests belonging to persons unknown, can they be. They are proceedings which have regard to the land itself rather than to the owners of the land, and if the owners are named in the proceedings and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that an opportunity for a hearing is not lost to them, than from any necessity that the case shall assume that form." The State possesses all the attributes of sovereignty save those surrendered to the Federal government or prohibited to them by the Federal constitution. Among these attributes is the right to prescribe forms of action for the enforcement of rights public or private. The only inhibition upon the exercise of this right is the provision of the constitution that these forms of action shall conform to the requirements of the meaning of the phrase, "due process of law," the principal characteristic of which is that notice and an opportunity to be heard must be provided for. The State may therefore provide for a proceeding strictly in rem, if notice and an opportunity to be heard is provided for. If it may provide for a proceeding strictly in rem it may also provide "that it shall be immaterial that the names of the owners are incorrectly al-

leged." The failure, therefore, to name Josephine W. Ballard in the published notice which described the land and ran to A. B. Ballard and all others interested therein was not a deprivation of her property without due process of law.

Iowa Central Ry. Co. v. Iowa, 160 U. S. 389.
Davidson v. New Orleans, 96 U. S. 97.
Tyler v. Judges, 175 Mass. 71.

The four weeks' notice provided by the levee act by publication to unknown owners and owners of lands who are non-residents of the county in which suit is brought is not so unreasonable as to amount to a taking of property without due process of law, nor does it abridge the privileges or immunities of citizens of the United States, nor does it discriminate against citizens of other States, nor does it amount to a denial of the equal protection of the laws to persons within the jurisdiction of the court.

Assignment of Error VI. attempts to raise all the foregoing questions. The levee act provides for four weeks' notice by publication to unknown owners and non-residents of the county in which suit is brought. So far as service of process is concerned the levee act divides defendants into two classes. First, residents of the county in which suit is brought who appear to be owners of lands sued upon by the record of deeds of said county; and second, non-residents of the county and unknown owners. The act also provided for additional service where the defendant is in the county or there is an occupant upon the land. This service is in addition to the publication, and is made by the personal service of summons upon the defendant or occupant, respectively. The same service is provided for citizens of the State who are

non-residents of the county in which suit is brought, as is provided for citizens of other States. The act therefore does not discriminate against citizens of other States, nor when viewed in any light can we conceive how it can be said to abridge the privileges or immunities of citizens of the United States. As to the violation of the due process of law clause it has been repeatedly settled that where the procedure provided allows an opportunity for a hearing at any stage of the proceedings it is sufficient. The procedure provided must be so drastic and unreasonable as to shock the conscience and amount to a practical confiscation of a citizen's property by legislative act before it will be declared violative of this clause. In the case of non-residents of the county the act provides for four weeks' publication of a designated notice. A decree of sale cannot be taken before that time. After the decree two weeks' notice of sale is required before the property can be sold. At any time before the sale the owner can come in and redeem his property by payment of the taxes due thereon. The act further provides that the owner can come in at any time within three years from the date of the final decree and by showing payment of taxes have the decree set aside. These provisions for contesting the validity of the tax are certainly reasonable. The following cases bear out our contention:

Arndt v. Griggs, 134 U. S. 316.
Bellingham Bay v. New Whatcom, 172 U. S. 314.
Davidson v. New Orleans, 96 U. S. 97.
Tyler v. Judges, 175 Mass. 71.
Hager v. Reclamation Dist., 111 U. S. 701.
Wurtz v. Hoagland, 114 U. S. 606.
Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112.

Bauman v. Ross, 167 U. S. 548.
Hanover Nat'l Bank v. Moyses, 186 U. S. 181, 192.
Manson v. Duncasson, 166 U. S. 533.
Johnson v. Hunter, 127 Fed. Rep. 222.
Huling v. Kaw Valley Ry., 130 U. S. 559-563.

The levee act is not a private act, but a public act, operating over a limited territory of which plaintiffs in error were bound to take notice, and proceedings had under this levee act constitute due process of law.

Assignment of Error VII. raises the question that the levee act is a private act of which plaintiffs in error were not bound to take notice, and that therefore the proceedings had under such act are not binding upon them and constitute a taking of their property without due process of law. We deem it unnecessary to take up the time of the court in argument of this question. The cases cited ante under Assignment of Error VI. are a sufficient answer. See also—

Huling v. Kaw Valley Ry., 130 U. S. 559-563,
Johnson v. Hunter, 127 Fed. Rep. 222.

An erroneous construction by a State court of matters of practice under a State statute, where the statute as construed by the court provided for notice and an opportunity to be heard, is not a deprivation of property without due process of law.

Assignments of Error VIII. and IX. raise the question of the proper construction of the levee act by the State Supreme Court. The State has the right to enact any course of procedure it pleases, so long as it amounts to due process of law. The judiciary of the State has the final right to construe the State statutes, and if the stat-

utes as construed by the State Supreme Court do not deprive the defendant of due process of law no constitutional question is raised. The question of due process of law and the question of the proper construction of a State statute have nothing in common.

Baltimore Traction Co. v. Baltimore Belt Ry. Co., 151 U. S. 138.
Castillo v. McConnico, 168 U. S. 683.
Brown v. New Jersey, 175 U. S. 175.
Allen v. Georgia, 166 U. S. 138.
West v. Louisiana, 194 U. S. 263.
Thorington v. Montgomery, 147 U. S. 492.
In re King, 46 Fed. Rep. 911.

Assignment of Error VIII. says that the complaint in the cause of Board of Directors, St. Francis Levee District, v. Memphis Land and Timber Company, A. B. Ballard et al., did not state a cause of action. Conceding, for the purpose of argument, that a failure to state a cause of action would be fatal, it appears from a reading of the complaint (Tr. p. 9, et seq.) that a cause of action was stated. It may have been defective, but it was held sufficient by the State courts as well as by the Federal Court in Johnson v. Hunter, ante. The assignment also says that the affidavit to support the warning order was insufficient. This raises no constitutional question. The Legislature might have dispensed with any affidavit whatever if so minded. Therefore, even if the court erred in the construction of the statute, its construction prevails. An error in construction of an unessential provision of a statute which does not deprive the defendant of due process of law raises no question of constitutional construction. But the State court did not err in its con-

struction of the statute. The affidavit was sufficient and was by the State court properly construed as sufficient. True, it was held otherwise by the United States Circuit Court of Appeals for the Eighth Circuit upon appeal in the case of Johnson v. Hunter, not yet reported. But that court was in error in assuming that the question of the sufficiency of the affidavit was not brought to the attention of the court in the case of Ballard v. Hunter. It was brought before the court and was pressed upon the court in brief of counsel for Ballard that the affidavit was insufficient because it did not allege that Ballard was at the time absent from the county, and that there was no occupant upon the land. The court ignored this contention and held that an affidavit alleging non-residence alone was sufficient. This was the holding in Johnson v. Hunter, 127 Fed. Rep. 222, which case was followed by the Supreme Court. At the proper time a petition for certiorari will be presented to this court to bring the case of Johnson v. Hunter before this court for review for reasons which will be set out in the petition. The assignment also alleges that there was no sufficient proof of publication produced to the court. The decree recites (Tr. p. 15), "And the defendants * * * A. B. Ballard, * * * and owners of lands who are unknown, were severally constructively summoned by publication in a newspaper published in Crittenden county, Arkansas, weekly for four weeks before this day, proof of which has been previously filed herein." Kirby's Digest of the Laws of Arkansas, Section 4425, provides: "In all cases where it appears from a recital in the records of any such court, that such notice has been given, it shall be evidence of such fact." There is no evidence in the record of this

cause to the contrary. The said assignment also alleges that the record does not contain the necessary jurisdictional facts. The court held that it was not a special statutory proceeding, and that it was not therefore necessary for the record to recite jurisdictional facts. Assignment of Error IX. alleges that the cause was heard and decided without evidence. The decree (Tr. p. 16) recites the evidence upon which it was heard. The statute provides that it may be heard upon oral evidence. It was unnecessary for such evidence to be incorporated in the record.

For the reasons set forth above it is respectfully submitted that the writ of error sued out in this cause should be dismissed, or the decree of the Supreme Court of the State of Arkansas should be affirmed, with costs.

Respectfully submitted,

L. P. BERRY,

Of Counsel for Charles W. Hunter, Defendant in Error.

Supreme Court of the United States.

No. 123.—October Term, 1906.

A. B. Ballard and Josephine W. Ballard, Plaintiffs in Error, *vs.* Charles W. Hunter, A. Hackler, and The Board of Directors of the St. Francis Levee District.	In error to the Supreme Court of the State of Arkansas.

[January 14, 1907.]

This writ of error is prosecuted to review a judgment of the Supreme Court of Arkansas sustaining the validity of a sale of the lands of plaintiffs in error for levee taxes.

The State of Arkansas, by an act of its legislature passed February 15, 1893, created eight counties, or portions of eight counties, which constituted what was known as "St. Francis Basin," a levee district, for the purpose of constructing and maintaining levees against the waters of the Mississippi River, and incorporated a board of directors, giving it power to "levee the St. Francis front in Arkansas and to protect and maintain the same." The board was also authorized, for the purpose of building, repairing and maintaining the levee, to assess and levy annually a tax on all lands within the district, not exceeding five per cent of the increased value or betterment estimated to accrue from the protection given by the levee against floods from the river. The act prescribed that the land owners should determine upon the assessments and levy of the tax in a meeting called for that purpose upon notice by the board, and prescribed the procedure to be observed in the assessment and levy of the tax, and provided that the lands assessed should be entered upon the books, in convenient subdivisions, as surveyed by the United States Government, with appropriate columns showing the names and residences of owners of the lands, and mortgages of record, if any, known to the assessors; and that no error in the description of the lands should invalidate the assessments, if sufficient description was given to ascertain where the land was situated. The assessment was made a lien upon the lands in the nature of a mortgage.

Section 11 of the act was amended in 1895. As amended, it provided that a tax collector should be elected by the board of directors and be furnished a list of assessments for his county; that he should proceed to collect the assessments, and that if the assessments were not paid within thirty

days a penalty of twenty-five per cent should at once attach for such delinquency. The board of directors was required to enforce the collection of the taxes by chancery proceedings in a court of the county in which the lands were situated, having chancery jurisdiction, and it was provided that the court should give judgment against the persons claiming to be the owners of the lands, if known to the board, for the amount of such assessments, interest, penalties and costs. It was further provided that if the ownership of any of the delinquent lands should be unknown to the board the lands might be proceeded against "as being owned by unknown owners;" that the judgment should provide for sale of the delinquent land for cash by a commissioner of a court after advertisement as hereafter set out; and, further, that the proceedings and judgment should be in the nature of proceedings *in rem*, and it should be immaterial if the ownership of the lands should be incorrectly alleged; that the judgment should be enforced only against the land and not against any other property. All lands for each of the counties might be included in one suit, and all delinquent owners, including those unknown, might be made defendants, notice of the pendency of the suit to be given as against non-residents of the county and unknown owners respectively by publication weekly, for four weeks prior to the day of the term of court on which final judgment should be entered for the sale of the land, in some newspaper published in the county where the suit might be pending. The form of notice which might be given is inserted in the margin.*

It was provided that where the owners were unknown that fact should be stated in the published notice, and against any defendant who resided in the county, and whose ownership appeared on the records, notice should be

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*"St. Francis Levee District } Notice.
vs.
Delinquent Lands. }

"The following named persons and corporations, and all others having or claiming an interest in any of the following described lands, are hereby notified that suit is pending in the Circuit Court of ———— County, Arkansas, to enforce the collection of certain levee taxes on the subjoined list of lands, each supposed owner's lands being set opposite his or her or its name, respectively, together with the amounts severally due from each, to wit."

Then shall follow a list of supposed owners, with a descriptive list of said delinquent lands and amounts due thereon, respectively, as aforesaid; and said published notice may conclude in the following form:

"Said persons and corporations, and all others interested in said lands, are hereby notified that they are required by law to appear and make defense to said suit, or the same will be taken for confessed, and judgment final will be entered directing the sale of said lands for the purpose of collecting said delinquent levee taxes, together with the payment of interest, penalty and costs allowed by law."

given by the service of personal summons of the court at least twenty days before the day on which the defendant was required to answer, as set out in the summons. And the suit should stand for trial at the first term of the court after the complaint should be filed, if said four weeks in the case of a non-resident or unknown defendant, or twenty days in case of resident defendants, should expire before the first day of the term or during the term of the court to which the suit was brought, unless a continuance be granted for good cause shown, within the discretion of the court, and such continuance for good cause shown might be granted as to part of the land or defendants without affecting the duty of the court to dispose finally of the others as to whom no continuances might be granted. And it was further provided that actual service of summons should be had when the defendant was in the county or when there was an occupant upon the land. In all cases where notice had been properly given and where no answer had been filed, and the cause decided for the plaintiff, the court, by its decree, should grant the relief as prayed in the complaint, and should require the commissioner to sell the lands at the courthouse door, at public outcry, for cash, after first having advertised such sale weekly for two weeks consecutively, and convey to the purchasers the lands sold, the titles of which should thereupon vest in the purchaser against all persons whomsoever, saving rights to infants and insane persons. The act contained the following:

"Provided, that at any time within three years after the rendition of the final decree of the chancery court herein provided for, the owner of the lands may file his petition in the court rendering the decree, alleging the payment of the taxes on said lands for the year for which they were sold, and upon the establishment of that fact the court shall vacate and shall set aside said decree."

Section 4 of the act of 1895, amending the act of 1893, provided as follows:

"That section 13 of said act be amended so as to read as follows: Said suit shall be conducted in accordance with the practice and proceedings of chancery courts in this State, except as herein otherwise provided, and except that neither attorneys nor guardians *ad litem*, nor any provision of section 5877 of Sandels & Hill's Digest of the Statutes of Arkansas, shall be required, and except that said suits may be disposed of on oral testimony, as in ordinary suits at law; and this law shall be liberally construed to give said assessment lists the effect of *bona fide* mortgages, for a valuable consideration, and a first lien upon said land as against all persons having an interest therein. Provided, that no informality or irregularity in holding the meetings or in the description of valuation of the lands, or in the names of the owners or the number of acres therein, shall be a valid defense to such action."

Suit was brought, as provided for in the acts, and, in the complaint, plaintiff in error, A. B. Ballard, was made a defendant and named as a

non-resident of Crittenden County, Arkansas. Josephine W. Ballard was not made a defendant. In the list of lands attached to and made part of the complaint the following appears:

Township 4 North, Range 7 East.

West half south east quarter section 32, T. 4 N. R. 7 E. 480 acres, assessed to A. B. Ballard—

Taxes for 1895, $19.20
" " 1896, 19.20
" " 1897, 19.20

West half north east quarter, section 32, T. 4 N. R. 7 E. 80 acres, assessed to A. B. Ballard—

Taxes for 1895, $3.20
" " 1896, 3.20
" " 1897, 3.20

North east quarter section 31, T. 4 N. R. 7 E. 160 acres, assessed to A. B. Ballard—

Taxes for 1895, $6.40
" " 1896, 6.40

A decree in due course passed against defendants. It designated the defendants who were duly served with summons, as shown by the return of the sheriff, and made default, and the defendants who were, as the decree recites, "severally, constructively summoned by publication in the newspaper published in Crittenden County, Arkansas, weekly, for four weeks before this day, proof of which has been previously filed herein, and all of the before named defendants . . . having failed to plead, answer or demur to the complaint of the plaintiff, the court, on motion of the attorney for the plaintiff, awards a decree *pro confesso* as to them in favor of the plaintiff for the amount of taxes, interest, penalty and costs due for their said lands." The court also found and recited the steps preceding the assessment of the taxes, the assessment of the same, and that "all of said taxes on said lands of said defendants are yet wholly unpaid and are delinquent." A lien was declared, and it was considered and adjudged that plaintiff recover from the defendants severally, to be enforced wholly against said lands, the amount of taxes, interest, penalty and costs assessed, levied and extended against the lands belonging to each of said defendants, respectively, for the years 1893, 1894, 1895, 1896 and 1897. A list of the lands was given, in which were the lands assessed against A. B. Ballard (described in the opinion). The lands were decreed to be sold, and it was also decreed that there should be allowed to the commissioner fees as follows:

"For furnishing printer with list of lands to be advertised, five cents per tract, and for attending and making and reporting sale, twenty-five (25) cents per tract; and there shall be allowed to the printer for publishing said notice fifty (50) cents per tract, which fee shall be taxed as costs

against each several tract, to be paid by the purchaser or person discharging said lien before sale, and the said commissioner shall report his proceedings hereunder to the next term of this court."

In the report of the commissioner of his proceedings under the decree he showed that he sold the lands in section 31 to A. Hackler and the lands in section 32 to C. W. Hunter, hereafter described.

The sale was approved and the deeds made were also approved.

At September term of the court, 1899, the following order was entered:

"A. B. Ballard and Mrs. Josephine W. Ballard come by their solicitors and on their motion leave is given them to file herein their answer, motion, petition and bill of review herein, and be made parties to this suit with reference to the N. E. ¼ of Section 31, The Southwest ¼ of section 32, and the south ½ of the North west ¼ of section 32, all in township 4 North Range 7 East, and the said pleading is ordered to be filed and they are made defendants and parties to this suit for the purposes set out in said pleadings.

"And thereupon the said C. W. Hunter, by L. P. Berry, Esq., his attorney enters his appearance herein and has ninety days given him within which to plead answer or demur herein."

It does not appear that A. Hackler or the board of directors of the levee district ever entered their appearance or were made parties to the proceeding.

In compliance with the order, plaintiffs in error filed what is called in the record "Answer to motion of Ballard." It commences as follows:

"To the Hon. E. D. Robertson, Chancellor:

"The answer and motion of A. B. Ballard, who is a citizen of the State of Florida, residing at Tampa, and Mrs. Josephine W. Ballard, who is a citizen of the State of Georgia, residing at Atlanta, also to be taken and considered as a petition, under sections 5839–5843, Sandels & Hill's Digest, and as an original complaint, under sections 4197–4199 of same, and under sections 6120–6124 of same, and the amendments thereto, and as a bill of review under the chancery practice, as appears by the prayer herein."

It then sets out in detail the facts which constitute the basis of the assignment of errors in this court presently given, as well as specifications of errors under the constitution and statutes of the State. It prayed that the paper be considered in the several characters mentioned in its opening paragraph; that all the parties to the original suit be considered parties, including the purchasers at the sale; that the decree of the 14th of February, 1898, be "reviewed, reversed and vacated, and that the report of the sales and the sales be set aside and the deeds cancelled."

The case was submitted on a statement of facts, by which it was agreed that plaintiffs in error were the owners of the land on the 21st day of December, 1897, and that their title appeared of record. That at that date they were, and continued to be, respectively, citizens of Florida and

of Georgia, and that they would testify that they had no knowledge of the suit or its pendency, or that taxes for levee purposes had been levied prior to the date of the sale of their lands and the purchase thereof by Hunter or Hackler, or "that any law on that subject had been enacted." That the clerk of the court was allowed one dollar for each of the deeds made in pursuance of the sale, and allowed the fees set out in the decree, and all said sums were taxed as costs and paid out of the proceeds of sale. That plaintiff in error made the tenders to Hunter and Hackler, respectively, as stated in "their answer and motion filed herein on the 25th day of September, 1899, and in the manner and at the time stated, and that the said C. W. Hunter and A. Hackler, respectively, refused to receive such tenders and severally refused to state the amounts that they claimed they were entitled to receive in order to redeem the said tracts of land respectively."

It was also agreed that the record of the suit, including all orders, returns of officers, minutes of proceedings, etc., should be read in evidence, subject only to objections for irrelevancy and incompetency.

The decree of the court, after reciting the submission of the case and upon what submitted, concluded as follows: "The court orders that all the relief as prayed for in the said answer, motion, petition and original complaint of the said A. B. Ballard and Josephine W. Ballard be and the same is hereby denied and refused, and that the said answer, motion, petition and original complaint be and the same is hereby dismissed."

The Supreme Court of the State affirmed the decree.

The errors assigned are that the Supreme Court erred in not decreeing that (1) The lands of plaintiffs in error were not properly described in the complaint. (2) and (3) In not decreeing that the sale was unlawfully made, for the reason that the lands of plaintiffs in error were sold as a whole and for taxes on the whole west one-half of section 32, when plaintiffs in error did not own or claim the N. ½ of the N.W. ¼ of that section. (4) The decree was void because the lands were sold for sums not legally chargeable thereon. (5) That the acts of 1893 and 1895 required a notice to be given to the owners of the lands proceeded against in the suit they provided for, and no such notice was given, and the sales were therefore unauthorized and void. (6) The notice provided for by the act, assuming notice was given, was insufficient. It was not such a notice of the pendency of the suit as the act or the general law required to be given to the owners of lands resident in the State of Arkansas and Crittenden County, where the lands were located, and to persons owning lands there similarly circumstanced and subject to the same taxation, or persons having tenants on such lands. All such persons were entitled by said act and had personal service for at least twenty days before the rendition of the decree of sale.

Plaintiffs in error, respectively citizens of Georgia and Florida, were allowed and given constructive service, if any were given, only by publication in a newspaper, published in Crittenden County, and only weekly for four weeks, the first notice being, and required to be, only four weeks before the rendition of the decree. Plaintiffs in error had no personal or other notice of the suit, and did not appear therein. They were denied thereby the privileges and immunities of citizens of the United States and of Arkansas, and denied the equal protection of the laws within the State of Arkansas, and deprived of their property without due process of law, in violation of the Constitution of the United States, and the decree of sale and sales thereunder are void. (8) In not decreeing that the sales of the land of the plaintiffs in error were void and passed no title, because in the suit the laws of the State were violated in that (*a*) the complaint was deficient; (*b*) there was no sufficient affidavit made and filed to support a warning order or order for notice to plaintiffs in error; (*c*) there was no sufficient proof of publication of a warning order or notice filed or produced in court when decree of sale was made; (*d*) the decree of sale did not state, and the record did not show, the facts essential to the validity of the decree of sale as against plaintiffs in error or other lands. Thereby the plaintiffs in error, in violation of the Constitution of the United States, have been denied the benefit of such laws in this suit. (9) The decree of sale was rendered in violation of the laws of Arkansas requiring proof of evidence to support the allegations of the plaintiff as against plaintiffs in error, persons before the court only by a constructive service of process. And the decree was pronounced as based on an alleged order or decree *pro confesso* entered in the suit, not authorized by law, and so was rendered without due process of law, in violation of the Constitution of the United States.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the Court.

The assignments of error present the contention that plaintiffs in error have been deprived of their property without due process of law. One of them urges, in addition, the clauses of the Fourteenth Amendment, which prohibit a State from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, and from depriving any person within her jurisdiction the equal protection of the laws. Plaintiffs in error invoke those provisions against the statutes of Arkansas, because of the different manner and time of service of summons of the suit authorized by said statutes to enforce the payment of the levee taxes. It is contended that, by requiring personal service of summons upon resident owners or occupants of lands for at least twenty days before

the rendition of the decree of sale, and providing for constructive service by publication upon non-resident owners of only four weeks, a discrimination is made between owners of lands, and that non-resident owners are thereby denied the rights secured to them by the Constitution of the United States. We have no doubt of the power of the State to so discriminate, nor do we think extended discussion is necessary. Personal service upon non-residents is not always within the State's power. Its process is limited by its boundaries. Constructive service is at times a necessary resource. The land stands accountable to the demands of the State, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced. *Huling* v. *Kaw Valley Railroad*, 130 U. S. 559. This accountability of the land and the knowledge the owners must be presumed to have had of the laws affecting it is an answer to the contention of the insufficiency of the service. Certainly it was not so insufficient that it can be said that a difference in the time allowed for such service was not the equivalent of that allowed to resident owners. Mixed with the contention is a charge that the notice to non-residents did not comply with the act of 1893 or the general law of the State, but this is decided against plaintiffs in error by the Supreme Court of the State, and we accept its ruling.

In passing upon the other contentions of plaintiffs in error we are brought to the consideration of what is due process of law. A precise definition has never been attempted. It does not always mean proceedings in court. *Murray's Lessees* v. *Hoboken*, 18 How. 212; *McMillan* v. *Anderson*, 95 U. S. 37. Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case. *Dent* v. *West Virginia*, 129 U. S. 114; *Lent* v. *Tillson*, 140 U. S. 316; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Iowa Central R. R. Co.* v. *Iowa*, 160 U. S. 389.

In *Davidson* v. *New Orleans*, 95 U. S. 97, a proposition was laid down which has since been quoted many times. The court said, at pages 104 and 105: "That whenever, by the laws of a State or by State authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." And Mr. Justice Bradley, in a concurring opinion, said, on pages 107 and 108,

"that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvement, or none of these; and if found to be suitable or admissible in the special case it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive and unjust it may be declared to be not 'due process of law.' Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs and preferences of the people of the particular State may require." See also *Marchant* v. *Pennsylvania R. R. Co.*, 153 U. S. 380, and *Holden* v. *Hardy*, 169 U. S. 366.

In *Castillo* v. *McConnico*, 168 U. S. 674, prior decisions defining due process of law were applied to a law assessing taxes. The case involved the validity of a title derived from a tax sale made to enforce delinquent State taxes. The title thus acquired was assailed on the ground that the assessment upon which it was based was void because the property was not assessed in the name of its owner. The State law made the deed given in pursuance of the sale *prima facie* evidence of the fact that the property was subject to taxation and the fact that the taxes had not been paid, and conclusive evidence that the property had been assessed, the taxes levied and the property advertised according to law; also that the property was adjudicated and sold, as stated in the deed, and all the prerequisites of the law were complied with from the assessment, up to and including the execution and registry of the deed. The State court sustained the sale. This court, in passing upon the contention that the assessment and sale constituted a taking of property without due process of law, went behind the presumptions created by the deed, considered the alleged defects in the assessment and the advertisement and decided that a notice of thirty days by publication was due process of law. The court also decided that, although the statutes under which the assessment was made provided for the placing of the name of the owner on the assessment roll, where such name was known, they also provided that the property assessed should be described in the assessment roll; and, therefore, that the notice required by the statute was not addressed to each person assessed, but to all persons having property subject to taxation. It was held that the statute afforded both constructive and actual notice. "It can not be doubted," it was said at page 681, "that, in the exercise of its taxing power, the State of Louisiana could have directed that the property subject to its taxing authority should be assessed without any reference whatever to the name of the owner, that is to say, by any such description and method as would have been legally adequate to convey either actual or constructive notice to the owner. As said in *Witherspoon*

v. *Duncan* 71 U. S., 4 Wall. 217: 'It is not the province of this court to interfere with the policy of the revenue laws of the State, nor with the interpretation given to them by their courts. Arkansas has the right to determine the manner of levying and collecting taxes, and can declare that the particular tract of land shall be chargeable with the taxes, no matter who is the owner or in whose name it is assessed and advertised, and that an erroneous assessment does not vitiate a sale for taxes.'" See also *Tupin* v. *Lemon*, 187 U. S. 51, and *Leigh* v. *Green*, 193 U. S. 79.

In view of these principles let us examine the contentions of the plaintiffs in error.

First. They charge that there is an incorrect description of the lands owned by plaintiffs in error in the original complaint and decree, in that they did not own all the lands described or sold. In the original transcript of the record there were apparently discrepancies between the lands assessed and those described in the decree. These discrepancies have been corrected by the return to a certiorari granted for that purpose, and it appears that the lands assessed and those decreed to be sold in section 32, T. 4 N., R 7 E., were the W. ½ and S.E. ¼, 480 acres, W. ½ of N.E. ¼, 80 acres. Plaintiffs in error, however, allege that they owned only the S.W. ¼ and the S. ½ of the N.W. ¼, and contend that the two tracts owned by them made up 240 acres, and the two tracts sold by the commissioner and conveyed to Hunter, embracing such 240 acres, made 480 acres. Thus, it is urged, the lands plaintiffs in error owned were sold to pay the levee taxes on land they did not own, and their lands were thereby taken without due process of law.

This point was made in the complaint attacking the decree and sale, but was not passed on by the Supreme Court. Presumably the court regarded the point as precluded by the original decree and not a ground upon which the decree could be attacked, and this is our view. What lands were properly assessed to Ballard and what lands he owned were facts to be alleged in the original suit and established by the proof there introduced or by admission through the default of the owners of the lands. If there was error it can not be a ground of setting aside the decree if the court had acquired jurisdiction to render the decree. Error or irregularities in the suit does not take from it or its decree the attribute of due process. *Central Land Company* v. *Laidley*, 159 U. S. 103; *Iowa Central R. R. Co.* v. *Iowa*, *supra*. It is only with this aspect of the suit and decree with which we are concerned. No defense, therefore, which could have been made or rights which could have been taken care of in the suit can now be set up to impugn its decree.

The statutes of the State, under which the taxes were levied, virtually make the land a party to the suit to collect the taxes. It is from the

lands alone, and not from their owner, that the taxes are to be satisfied, and each acre bears its part. The burden of taxation could have been easily and definitely assigned by the court. Mistakes in ascribing the ownership of the lands did not increase the taxation or cast that which should have been paid by one tract of land upon another tract. In *Doyle* v. *Martin*, 55 Ark. 37, it was held that it is no valid objection to a tax proceeding against land owned by one person that it was described, not separately but as a portion of a larger tract owned by a different person. See also *Minneapolis Ry. T. Co.* v. *Minnesota D. Co.*, 81 Minn. 66.

Second. The fourth error assigned is that the lands were sold for sums not legally chargeable thereon. The illegal charges alleged are fees to the commissioner for furnishing the printer with a list of lands sold—fees to the commissioner for reporting the sale and to the printer for publishing notice of sale. The comment we have made above applies to this assignment of error. The act under which the suit was brought provided that notice to those interested in the delinquent lands proceeded against should specify, among other things, that a final judgment would be entered, "directing the sale of lands for the purpose of collecting said delinquent levee taxes, together with the payment of interest, penalty and costs allowed by law." It was for the court to determine, therefore, what costs were allowed by law, and an erroneous judgment of what the law allowed did not deprive the defendants in the suit of their property without due process of law. The Supreme Court, in passing on this objection, said: "A decree of a court of competent jurisdiction is not subject to a collateral attack because lands were sold thereunder for illegal penalties and costs. *Harry E. Kelley* v. *Laconia Levee District*, MSS. Opinions; *Johnson* v. *Hunter*, *supra*." And this decision is an answer to the other decisions of Arkansas cited by plaintiffs in error, to the effect that a sale for taxes, in excess of the amount due or embracing costs not legally due, is void. And the case at bar is also distinguishable from the cases cited from this court.*

Third. The fifth assignment of error is based on the contention that the Supreme Court of the State erred in not deciding that plaintiffs in error were not given the notice required by the statutes of the State. This assignment of error is elaborately argued by counsel, but the distinction is not clearly made between the construction of the statutes and their effect as construed. What the statute required was for the Supreme Court to determine; whether, as determined, it constituted due process is for us to

*French *v.* Edwards, 13 Wall. 514; Walker *v.* Turner, 9 Wheat. 541; Moore *v.* Brown, 11 How. 411; Woods *v.* Freeman, 1 Wall. 398; McCung *v.* Ross, 5 Wheat. 116; Thatcher *v.* Powell, 6 Wheat. 119; Gage *v.* Pumpelly, 115 U. S. 454; Dick *v.* Foraker, 155 U. S. 404.

decide. The case at bar does not come within *Huntington* v. *Attrill*, 146 U. S. 651, or *Scott* v. *McNeal*, 154 U. S. 34, or the cases where the statute of a State was assailed as impairing the obligation of a contract. We come then to what was done in the suit which decreed the sale, and the discussion answers as well for the other assignments of error without specially enumerating them. The ultimate ground of all of them is that the proceedings were conducted without the notice to plaintiffs in error required by the demands of due process of law. In discussing the contention of plaintiffs in error, that they had been denied the equal protection of the laws by the different manner of service upon resident and non-resident owners of land, and the different times for appearance after service, we declared that it was competent for the State to make the distinction, and that the notice and time were adequate to give to plaintiffs in error the equal protection of the laws. They were also adequate to afford due process of law. And we will pass to the consideration of the other objections. The most important are the following: That there was no sufficient affidavit made and filed to support a warning order or order for notice to plaintiffs in error, and there was no proof of such order or notice filed or produced in court when the decree was rendered. Replying to these objections, the Supreme Court said:

"3. The act provides that notice by publication shall be given to the defendants in suits instituted for the collections of levee taxes, who are non-residents of the county where the suits are brought. The plaintiff in the complaint in the proceedings attacked in this suit stated who of the defendants therein were non-residents of the county in which the proceedings were pending; and such complaint was sworn to. This was sufficient to authorize notice, by publication, without a separate affidavit to the same effect. It was held in *Sannoner* v. *Jacobson*, (47 Ark. 31,) that an affidavit and complaint may be included in one instrument of writing, if it contains all the essentials of both. The complaint in the proceedings attacked contained the essentials of the affidavit and is sufficient to answer the same purpose. (*Johnson* v. *Hunter*, *supra*.)

"The act under which the aforesaid proceedings were instituted does not require a warning order to be entered on record, or the complaint; and if it had the proceedings could not be attacked collaterally, unless such entry was made jurisdictional, as it was in *Gregory* v. *Bartlett*, (55 Ark. 30,) and it was not in this case. (*Clay* v. *Bilby*, 78 S. W. Rep. 749.)"

The court held, therefore, that, under the laws of the State, an "affidavit and complaint may be included in one instrument of writing, if it contains all the essentials of both." And it was held that the complaint in the proceedings attacked did contain those essentials. If we could dispute with the Supreme Court at all upon the requirements of the laws of the State it would have to be on a clearer showing of error than is made in the case at bar. The statute provides that all or any part of the delin-

quent lands for a county may be included in the suit instituted in such county, and there may be included in the suit known and unknown owners; "and notice of the pendency of such suit shall be given as against non-residents owners of the county and unknown owners, respectively," by publication weekly. The time of publication is specified. The complaint showed that Ballard was the owner of the lands and that he was a non-resident of the county. It is said, however, that Josephine Ballard was not made a defendant in the suit, though the records of the county showed that she was an owner thereof. But the statute provided against such an omission. It provided that the proceedings and judgment should be in the nature of proceedings *in rem*, and that it should be immaterial that the ownership of the lands might be incorrectly alleged in the proceedings. We see no want of due process in that requirement, or what was done under it. It is manifest that any criticism of either is answered by the cases we have cited. The proceedings were appropriate to the nature of the case.

It should be kept in mind that the laws of a State come under the prohibition of the Fourteenth Amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man. The law can not give personal notice of its provisions or proceedings to every one. It charges every one with knowledge of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate men usually keep informed, and on that probability the law may frame its proceedings; indeed, must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises. This was pointed out in *Huling* v. *Kaw Valley Railway & Improvement Company*, 130 U. S. 559, where it was declared to be the "duty of the owner of real estate, who is a non-resident, to take measures that in some way he shall be represented when his property is called into requisition; and if he fails to get notice by the ordinary publications which have been usually required in such cases, it is his misfortune, and he must abide the consequences." It makes no difference, therefore, that plaintiffs in error did not have personal notice of the suit to collect the taxes on their lands or that taxes had been levied, or knowledge of the law under which the taxes had been levied.

Our attention is directed to the case of *Johnson* v. *Hunter*, decided by the Circuit Court of Appeals for the Eighth Circuit, 147 Fed. Rep. 133, to establish that the verified complaint in the suit to collect the levee taxes was not sufficient to sustain the service by publication. The appellants in that case were complainants in the Circuit Court in a suit to quiet

their title against sales under decrees made in suits prosecuted by the St. Francis Levee District—suits identical with that with which the case at bar is concerned. The court held that an affidavit, "adapted to the terms of the levee act," and placed on record in the suit, was a prerequisite to the issuance and publication of the prescribed warning order, and was strictly jurisdictional. A number of cases were cited. Considering the terms of the levee act, the court quoted the following provisions of section 11 as amended February 15, 1893: "And provided further, actual notice of summons shall be had where the defendant is in the county or where there is an occupant upon the land." "The conditions are," the court said, "that the defendant must be a non-resident of the county, and must be absent therefrom, and that there must not be an occupant upon the land. If the defendant be a resident of the county, or be present therein, or if there be an occupant upon the land, actual service of summons is required. . . . And a defendant may be a non-resident of the county and absent therefrom and yet the land be occupied by a tenant or other representative upon whom a summons can be served. If the land is so occupied the act plainly calls for such service. *Banks* v. *St. Francis Levee District*, 66 Ark. 490, 51 S. W. 830." The court assented to the view that a complaint, properly verified, containing what was required to be set forth, would be a sufficient affidavit to sustain service by publication, but observed, "that of the three concurring conditions, without the existence of each that mode of service was not permissible, the complaints alleged the existence of one, and were altogether silent in respect to the other two, that is, that Johnson (the defendant) was a non-resident of the county, but did not state that he was not present therein or that there was not an occupant on the lands."

Referring to the case of *Memphis Land & Lumber Co.* v. *St. Francis Levee District*, 70 Ark. 409, and the decision of the Supreme Court of the State in the case at bar, it was said: "In one the question actually considered was whether or not an affidavit for publication was necessary, rather than what it should contain, and in the other it was whether or not any affidavit and verified complaint could perform the office of such an affidavit; but in neither does the court's attention appear to have been directed to the provision, 'and provided further, actual service of summons shall be had where the defendant is in the county or where there is an occupant upon the land.' In the arrangement of the act this provision is somewhat separated from the others which it is obviously designed to modify and restrain, and, in the absence of any controversy respecting it, it may well be that it was not observed by the court." We can not concur in the supposition. We think those cases can be better explained by a different supposition. In the case at bar plaintiffs in error are not in

a position to make the objection. They do not assert that, though non-residents of the county, they were present therein or that their lands were occupied by a tenant or other representatives, as was the case in *Banks* v. *St. Francis Levee District*, 66 Ark. 490. They on the contrary assert, and make it a ground of relief under the Constitution of the United States, that as non-residents they were discriminated against, in that the acts of 1895 did not require the same notice to be given to non-resident owners as to resident owners or to persons owning and having tenants upon the land.

Plaintiffs in error, it is true, alleged that no "sufficient affidavit of the plaintiff" was filed "stating positively or sufficiently any one of the facts" required to be stated, and that the clerk did not make on the complaint or otherwise any warning order to plaintiffs in error, or to either of them, to appear in the suit as required, or which obliged them to appear therein or bound them by the proceedings which were had therein. But there was no allegation that either of them was in the county or that there was an occupant upon their lands. Not being defendants who were entitled to personal service, they can not urge against the decree that they were not given personal service or complain that the complaint was insufficient as an affidavit for service by publication, because it did not deny the existence of conditions which there is no pretence existed.

Another assignment of error is that "there was no sufficient proof of the publication of any warning order, or any notice to the plaintiffs in error, filed or produced in court when the decree of sale of their lands was rendered." To this contention the Supreme Court replied: "The act under which the aforesaid proceedings were instituted does not require a warning order to be entered on record or the complaint, and if it had the proceedings could not be attacked collaterally, unless such entry was made jurisdictional, as it was in *Gregory* v. *Bartlett*, 55 Ark. 30, and it was not in this case. *Clay* v. *Bilby*, 78 S. W. Rep. 749." And the decree recites that the defendants "were severally constructively summoned by publication, . . . proof of which has been previously filed herein." The contention of plaintiffs in error is therefore answered by *Grignon's Lessee* v. *Astor et al.*, 2 How. 319; *Sargent et al.* v. *The State Bank of Indiana*,, 12 How. 371; *Voorhees* v. *The Bank of United States*, 10 Pet. 449; *Applegate* v. *Lexington &c. Mining Co.*, 255.

The other assignments of error do not require specific mention. They are either answered by that which we have already said or do not involve jurisdictional questions.

Decree affirmed

Mr. Justice BREWER concurs in the judgment.